VOLUME 55

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Abstract

55 I.A.2 1

No. 64 - 52

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Defendant in Error,	)	
	)	
vs.	)	Error to the
	)	Circuit Court of
THOMAS L. JOHNSON, JR.,	)	Winnebago County
	)	
Plaintiff in Error	)	

ABRAHAMSON, P. J.

The defendant, Thomas L. Johnson, Jr., was tried by a jury in the Circuit Court of Winnebago County, found guilty of armed robbery and sentenced to the penitentiary for a term of not less than five nor more than fifteen years. He prosecutes this writ of error contending (1) that the evidence is insufficient to support the judgment of conviction, and, in the alternative, (2) that the actions of the trial judge denied him a fair trial.

The defendant was convicted of the armed robbery of one Martin Metcalf, a cab driver, at approximately 1:30 A. M. on the morning of June 29, 1961, in the City of Rockford, Winnebago County. Metcalf identified the defendant in open court as the man who had robbed him.

In defense, several witnesses were produced who testified

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HOWARD K. KELLETT
Clerk, Appellate District, Second District

that defendant, Thomas L. Johnson, Jr., had, in fact, been socializing at an establishment known as Paradise Inn from approximately 11:00 P. M. of June 28, 1961, to 3:00 A. M. June 29, 1961. Two of the witnesses for the defendant, Freddie Gary and Willie Harrington, testified positively to this fact, while several of the others expressed some doubt as to the exact date on which they observed Johnson at the Paradise between those hours.

The record indicates that the Court joined rather freely in the examination of Gary and Harrington, and, before the jury, clearly manifested its disbelief in their testimony. At the close of the direct examination of Harrington, for example, the Court proceeded to cross-examine the witness in the following manner:

The Court:	Do you know what perjury is?
Answer:	No, Sir, I don't.
Court:	You don't know what it is?
Answer:	No.
Court:	That means when you get up to swear to something, and you don't tell the truth - -
Answer:	Well, I told the truth.
Court:	Now, if you don't tell the truth you are guilty of what is known as perjury. And that calls for a term in the penitentiary of not more than five years. You understand?
Answer:	Yes, I understand.
Court:	Do you want to change your testimony at all?
Answer:	Well, Your Honor, that is when I seen him.
Court:	Do you want to change your testimony at all?
Answer:	No, I don't want to change it.
Court:	You are not going to change it at all?
Answer:	No.
Court:	You are going to stick to the fact that he was there between 11:00 o'clock at night and 4:00 o'clock in the morning. Is that your story?

Answer: Well, that is when he left.
Court: You saw him all the time during that night, did you or didn't you?
Answer: I did. I saw him when he came there at 11:00 o'clock, and he didn't leave because I left at 4:00 o'clock.
Court: Is this man in jail?
Mr. Penniman (Assistant State's Attorney): Yes.
Court: I'm going to order the State's Attorney to charge him with perjury. Hold him up in jail."

In the case of The People v. Santucci, 24 Ill. 2d 98, 180 N. E. 2d 491, the defendant was tried by a jury and found guilty of burglary. The alleged crime occurred at approximately 3:00 A. M. in the morning of January 31, 1960. A defense witness testified that the defendant was in her company on that night until immediately before his apprehension by the police. The trial court, at the close of direct and cross-examination, interrogated the witness in regard to her marital status, establishing that she was a married woman out with a man other than her husband, although this had already been brought out during the direct examination. The court, in reversing the judgment of the trial court stated as follows:

> "Ultimate decisions of fact must fairly be left to the jury, as must be the determination of the credibility of witnesses and the weight to be afforded their testimony, and to this end it is not the province of the judge, in a criminal case, to convey his opinions on such matters to the jurors by word or deed. (People v. Garines, 314 Ill. 413; People v. Finn, 17 Ill. 2d 614.) As pointed out on numerous occasions, jurors are ever watchful of the attitude of the judge, and any disclosure of disbelief or hostility on his part is very apt to influence them in arriving at their verdict. (People v. Coli, 2 Ill. 2d 186; People v. Marino, 414 Ill. 445; People v. Filipak, 322 Ill. 546.)"

In People v. Tyner, 30 Ill. 2d 101, 195 N. E. 2d 675, the defendant was convicted of a murder. The homicide had followed an earlier altercation between the various parties involved. A witness for the prosecution, upon cross-examination, testified that he did not know the cause of the earlier altercation. The court then proceeded to examine the witness, and remarked, in the presence of the jury, that he was sick and tired of this kind of testimony', and that the witness was lying like a goat. The court in reversing the decision pointed out the impropriety of the trial court as follows:

> Although a trial judge may question witnesses for purposes of clarification or to bring enlightenment upon issues otherwise obscure, he should do so in a fair and impartial manner without showing bias or prejudice against either party and without impugning the credibility of any witness. Rarely, if ever, is a judge called upon to comment on the evidence during trial except where necessary in ruling upon its admissibility, and under no circumstances should he express an opinion as to its veracity, for this is the province of the jury, and any intimation of such nature, however slight, may carry great weight with the jury and could prove controlling. People v. Marino, 414 Ill. 445, 111 N. E. 2d 534; People v. Lurie, 276 Ill. 630, 115 N. E. 130."

While a trial court has wide latitude in its conduct of a trial, it must not invade the province of the jury in determining the facts by indicating or insinuating in any way its belief or disbelief in the credibility of a witness. However improbable the testimony may seem, the accused is entitled to have its credibility considered as impartially and fairly as possible by the jury. The judge's relation

to the jury is such that he can, by his remarks or his acts, aptly and easily influence its ultimate decision, and he must be certain that his conduct is fair and impartial. People v. Marino, 414 Ill. 445; People v. Lurie, 276 Ill. 630; People v. Zaccognini, 29 Ill. 2d 308; People v. Sprinkle, 27 Ill. 2d 398.

In the instant case, we agree with the defendant's contention that the trial judge's interrogation of the defense witnesses, and his insinuations as to their veracity, clearly indicated his disbelief of their testimony, was prejudicial and denied defendant a fair trial.

The record, as quoted above and elsewhere, amply illustrates his complete lack of belief in the testimony of the witnesses, Harrington and Gary. His repeated references to the meaning and consequences of perjury, in conjunction with inquiries as to the witnesses' adherence to their testimony, could not fail to convey to the jury the court's discredit of their statements. His gratuitous threat of prosecution of one of the witnesses for perjury was as obvious an expression of his disbelief as could be imagined. In so impugning the credibility of the two key witnesses for the accused, he denied him a fair and impartial trial.

From what we have said, it is unnecessary for us to discuss the alternative grounds asserted by the defendant

in his Writ of Error.

For the reasons stated, the judgment of the Circuit Court of Winnebago County is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

CARROLL, J. and MORAN, J. concur.

No. 64-5

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JOSEPH M. DUFFY, Plaintiff-Appellee, v. SINCLAIR REFINING COMPANY, a Corporation, WESLEY R. CONNER, and JESSIE H. TOMIN, SINCLAIR REFINING COMPANY, a Corporation, Defendants-Appellants	)	Appeal from the Circuit Court of DuPage County.

ABRAHAMSON, P. J.

The plaintiff in this cause secured a judgment based upon a jury verdict in a personal injury action against the defendants arising out of an automobile-truck accident. The defendants' motion for a new trial predicated primarily upon the giving of an allegedly erroneous instruction, was overruled and they have appealed.

Around midnight on November 10, 1960, the defendant, Wiley, as an employee of the defendant, Sinclair Refining Company, was operating a tractor-trailer north on Route 83 where it overpasses Route 19 in Bensenville, Illinois. In that area Route 83 is a two lane highway permitting one lane of traffic in each direction and the overpass proper consisted

No. 84-5

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JOSEPH M. DUFFY,	)
	)
Plaintiff-Appellee,	)
	)
v.	) Appeal from the
	) Circuit Court of
SINCLAIR EXPRESS CORPORATION, a Corporation, WESLEY A. CORNER, and JESSE H. TOBIN,	) Kane County.
	)
SINCLAIR REFINING COMPANY, a Corporation,	)
	)
Defendant-Appellant.	)

ABRAHAMSON, C. J.

of a relatively flat platform approximately 200 feet long with inclines which returned vehicular traffic to grade. On the northerly incline, there is a guard rail some 18 inches east of the paved portion of the road.

Wiley testified that his truck had started to descend the incline when he had to bring it to a stop with the rear wheels at the 'breaking point' of the incline, because of congestion ahead due to an accident that had occurred in the southbound lane; that he put on his flasher, which had 4 lights, and applied his brakes, which lighted 3 good sized stop lights; that the Duffy vehicle did not seem to see the truck until just before the impact.

Duffy testified that as he approached the platform of the overpass, he was driving his car about 35 miles per hour; that as he started down the northerly incline, he saw the Sinclair truck for the first time, stopped approximately 50 feet from the crest; that he applied his brakes and turned to the left to see if he could pass it; that he had to turn back because of traffic and then hit the truck; that he was taken to the hospital where he was a patient for 3 days; that his injuries consisted of a cut head and 3 broken ribs; that upon leaving the hospital, he remained in bed at home for about 14 days; that he had trouble breathing for about a month after leaving the hospital because of the broken ribs.

Jess Tomin testified that he was involved in an accident at the bottom of the hill to the north and that he was aware that there was a truck parked in the highway in the northbound traffic lane about 15 feet from the top of the hill and that it was standing still. He noticed the lights of the vehicle

and that the driver was out of the truck in the southbound lane.

The defendant contends that the Court erred in giving plaintiff's Instruction # 12, which reads as follows:

> There was in force in the State of Illinois at the time of the occurrence in question a certain statute which provided that:
>
> 'Upon any highway outside of a business or residence district no person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the paved or main traveled part of the highway when it is practical to stop, park or so leave such vehicle off such part of said highway, but in every event a clear and unobstructed width of the highway opposite such standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicle shall be available from a distance of 200 feet in each direction upon such highway.'
>
> If you decide that the defendant violated the statute on the occasion in question, then you may consider that fact together with all of the other facts and circumstances in evidence in determining whether or not the defendant was negligent before and at the time of the occurrence.

by stating that the practice of giving abstract legal propositions is not approved, citing Burke v. Zwick (1939(299 Ill. App. 558. The instruction is patterned after I. P. I. Instruction # 60. 01. Upon examining the record, we find that the objection at the time of the trial conference with the Court was made to the instruction as follows:

> 'There is no evidence that the truck was parked on the highway, and to give the jury this instruction would be misleading and in my opinion error.

Limiting our examination of the instruction to this objection,

from the facts herein before recited, there appears to be some evidence that the truck in question was parked on the highway. We do not feel constrained to pass upon defendant's additional objections to Instruction # 12 because of his failure to enlighten the trial judge at the conference of erroneous instructions to the end that the jury may be properly instructed. Onderisin v. Elgin, J. & E. Ry. Co. (1959) 20 Ill. App. 2d 73, 77.

The second point urged for reversal is that the verdict is against the manifest weight of the evidence. The preceding brief summary of each party's version of the facts demonstrates that there was a substantial conflict regarding the relative positions of the vehicles on the incline, the ability of the plaintiff to observe the defendant's vehicle from the platform of the overpass, and the plaintiff's efforts to avoid the accident. Before we could reverse and remand on this ground, we would be obliged to find that the jury's verdict was against the manifest weight of the evidence, that is to say, an opposite conclusion must be clearly evident. Hinrichs v. Gummow (1963) 41 Ill. App. 2d 428, 190 N. E. 2d 610; Tabor v. Tazewell Service Company (1958) 18 Ill. App. 2d 593, 153 N. E. 2d 98). This we are unable to do.

The final point urged by the defendant is that the plaintiff failed to prove the exercise of due care at the time of the accident upon the following grounds:

1) that he failed to keep a proper look out.

2) if he had, he would have observed the tail lights in plenty of time, and

3) that instead of stopping his motor vehicle when he did see the truck, he

attempted to go into the southbound lane to pass the truck, and

4) was proceeding across the overpass at a speed greater than that which he could stop his car within the vision he had of the highway to the north of him.

The brief recital of the summary of the evidence herein does not permit us as a matter of law to say that the plaintiff was not in the exercise of ordinary care and caution for his own safety and this question is one of fact which was properly submitted to the jury.

In view of the conclusions herein reached the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

CARROLL, J. and MORAN, J. concur.

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A

Abstract

No. 64-27

55 I.A.2d 60

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

A

Lincoln Casualty Company,

Appellee,

vs.

Willard McCallister, individually and as next friend of Marvin McCallister, a minor, and Marvin McCallister, a minor,

Appellants

Appeal from the Circuit Court of Kane County

CARROLL - J.

This is a declaratory judgment action brought by plaintiff, Lincoln Casualty Company, in which it asked the circuit court to find and declare that it is not liable to indemnify the defendants, Aloha Lounge, Inc., Bernard Poss, or Richard Glazier, for certain acts of Glazier under a dram shop liability insurance policy in which it provided coverage to defendants, Aloha and Poss.

The record discloses that previous to the filing of plaintiff's complaint, the defendant, Willard McCallister, individually and as the next friend of Marvin McCallister, brought suit under the Dram Shop Act against Aloha and Glazier, alleging that Aloha sold or gave alcoholic beverages to Glazier which rendered the latter intoxicated; and that said intoxication was a cause of an automobile collision in which Marvin McCallister was injured. A jury trial resulted in a judgment against the defendants in the amount of $17,100.00. Plaintiff defended the action under a reservation of rights pursuant to the provisions of its policy.

Abstract

No. 69-47

IN THE

SUPREME COURT OF ILLINOIS

September Term

Illinois Peasantry Insurance,

Appellee,

vs.

Millard Dollarbiter, Individually and
as next friend of Darrin Dollarbiter,
a minor, and Merrie Dollarbiter, a
minor,

Appellants.

Appeal from the
Circuit Court of
Cook County

OPINION - J.

This is a declaratory judgment action brought by plaintiff, Illinois Peasantry Insurance, in which it seeks the construction of its automobile insurance policy in order to determine whether a cause exists entitling Insurance Underwriters, Inc., Insurance Plus, or Midway Casualty, for example, to refuse to defend, or pay judgments rendered in, defendants, Millard and Merrie Dollarbiter.

The pertinent facts are undisputed. On the night of September 3, 1967, the defendants, Millard Dollarbiter, individually and as next friend of Darrin Dollarbiter, brought suit against the Illinois Peasantry Insurance, alleging that Darrin Dollarbiter, a minor, was injured by a car driven by Merrie Dollarbiter, a minor, and insured by plaintiff. Plaintiff thereupon filed a complaint for declaratory judgment, seeking to determine whether the automobile insurance policy issued by it to Millard Dollarbiter provided coverage for the accident in which Darrin Dollarbiter was injured. A jury trial resulted in a verdict for defendants in the amount of $17,500.00. Plaintiff contended the motion under a construction of rights involved in the operation of the policy.

It is alleged in the complaint that the dram shop policy issued to Poss and Aloha contained the following condition: "This policy does not cover any loss caused directly or indirectly by any act of the owner or licensee or of any employee of such owner or licensee other than the selling and giving of alcoholic liquor upon the premises herein described". The complaint further alleged that Richard Glazier was an employee of Aloha at the time of the occurrence of the acts complained of in the Dram Shop action. The relief asked was a finding and declaration that plaintiff is not liable to indemnify defendants for the acts charged to Richard Glazier in the Dram Shop suit. The answers of the defendant denied that Glazier was an employee of Aloha as alleged in the complaint. The defendants also filed a counterclaim alleging that Glazier was not an employee of Aloha within the meaning of plaintiff's policy and praying a declaration that plaintiff was liable to indemnify Aloha for the judgment entered against it in the Dram Shop suit. A trial by the court resulted in a judgment in favor of plaintiff declaring that it is not liable to indemnify the defendants under its policy of insurance with Aloha and Poss. Defendants have appealed.

It is to be observed at the outset that the parties agree that the policy provision in question meant that if the liquor or part thereof causing the intoxication of Glazier was given or sold to him during his hours of employment at Aloha Lounge then liability of the plaintiff is excluded. Accordingly, the only question involved is whether Glazier was an employee of Aloha at the time he obtained the liquor causing his intoxication.

The automobile accident out of which the dram shop action arose occurred on October 17, 1960. Robert J. Tuyls testified that

on said date he and Glazier were both employed by Aloha; that Glazier worked that day from 1:00 a.m. to 6:00 a.m. doing porter work; that he opened the bar at 6:00 a.m. and worked as a bartender until 10:00 a.m.; that from 10:00 a.m. until approximately 5:00 p.m. he did more porter work and transferred inventory; that the witness saw Glazier off and on during the day; that Glazier finished his work at approximately 5:00 p.m. and left Aloha saying he was going home; that he next saw Glazier after the accident at approximately 5:15 or 5:30 p.m.; that the accident took place at the opposite corner of the block in which Aloha was located; and that on October 17, 1960 the witness did not serve any drinks to Glazier, nor did he see Glazier on that day drink anything of an alcoholic nature. The foregoing substantially represents the evidence introduced on the trial.

The defendants principal contention is that there is no evidence in the record to support the trial court's finding that Glazier was an employee of Aloha at the time the sale or gift of liquor was made to him. It is argued that Tuyls testified that Glazier did not drink on duty, and the trial court erred in disregarding such testimony and finding for plaintiff. Our attention is called to the rule that the testimony of an unimpeached witness not contradicted by positive testimony or circumstances and not inherently false or improbable may not be rejected. Cited are Larsen v. Glos, 235 Ill. 58. Porter v. Industrial Com., 352 Ill. 392. Kelly v. Jones, 290 Ill. 375. Morris v. Carroso, 292 Ill. App. 620. We are not unmindful of such rule as set forth in these cases but it is not applicable here. Tuyls did not testify, as stated in defendant's brief that Glazier did not drink on duty. The abstract shows that Tuyls testified on cross-examination that to his own personal knowledge, Glazier "never had anything to drink during the hours of his employment by Aloha Lounge". Limited as it was to that which was within

the personal knowledge of the witness, we think the statement could refer only to what he saw. It was the same as if the witness had said he didn't see Glazier take a drink while on duty. Accordingly it cannot be said that the trial court made a finding contrary to the direct testimony of Tuyls.

In a memorandum addressed to counsel and shown in the abstract, the trial judge pointed out that there had been a finding by the jury in the Dram Shop case that Glazier had obtained certain liquor at Aloha, his place of employment; and that there was no proof that he did any drinking there after his days work ended, or that he was either given or purchased any liquor after his hours of employment. We agree with the trial court's observations. Not only is there an absence of evidence of any drinking by Glazier after his employment ended but also there is no proof that after working he spent any time in his employer's establishment. It will be recalled that Tuyls' testimony was that Glazier finished working and left Aloha at approximately 5:00. When asked if he saw Glazier after he left at 5:00, this witness stated that he saw him after the accident at "approximately 5:15 - 5:30, somewhere in there". If Glazier tarried in Aloha for some period after 5:00 it would be difficult to believe that Tuyls would not have seen him. The question whether or not Glazier obtained liquor after his hours of employment at Aloha had ended was strictly one of fact to be determined by the trial court as the trier of the facts. A rule so well established as to scarcely require citation of authority is that a reviewing court will not disturb the findings of the fact trier unless clearly and palpably erroneous. Thomas v. Smith, 11 Ill. App. 2d 310. It was the province of the trial court to determine the weight of the evidence and the credibility of the witnesses. Necessarily it hadto draw

reasonable inferences and conclusions from the evidence. Upon consideration of all the testimony and circumstantial evidence, we are unable to say that a conclusion opposite to that reached by the trial court is clearly evident. Such being the case, we are not permitted to substitute our judgment for that of the trial judge. Peet v. Dolese and Shepard Co., 41 Ill. App. 2d 358.

Defendant also contends that the trial court erred in refusing to permit the witness Tuyls to testify concerning matters occurring before and during the trial of the Dram Shop case. The record shows that when Tuyls was called as a defense witness, he testified that he was a witness in the original Dram Shop case and had been called by Mr. Clancy who represented the defendants in that action under a reservation of rights and is counsel for plaintiff in this case. Defense counsel then asked the following questions:

> Q. Mr. Clancy was representing whom in that proceeding?
>
> Q. Mr. Tuyls, in the original lawsuit did you testify exactly as you have testified here with respect to the drinking of Mr. Glazier during the hours of his employment?
>
> Q. Mr. Tuyls, in the original lawsuit, is it not a fact that you were called as a witness by Mr. Clancy on behalf of the insurance company?

The trial court sustained an objection to each of these questions on the ground of immateriality and also refused defendant's offer of proof. If we correctly understand defendant's theory, it is to the effect that plaintiff, having called Tuyls as a witness in the Dram Shop case, was estopped to deny his testimony in the instant action. Such theory is not applicable here. The record shows that plaintiff defended the Dram Shop action under an express reservation of rights and accordingly was not bound by the testimony which

Tuyls gave in that action. Furthermore we think there was no occasion for plaintiff to deny the testimony in question. Whether Tuyls' testimony was the same in both cases was immaterial. The trial court did not err in sustaining plaintiff's objection to these questions.

For the reasons indicated herein, the judgment of the Circuit Court is affirmed.

AFFIRMED

ABRAHAMSON, P.J. and MORAN, J. Concur

Data pre in the entire. Furthermore we infer there was no consolation
the plaintiff to deny the testimony in question. Jordan Taylor
testimony can the case in both cases was inherent. The trial
court did not err in overruling plaintiff's objection to these
questions.

For the reasons indicated herein, the judgment of the Circuit
Court is affirmed.

AFFIRMED

Concurrence: I.J. and Wynn, J. Concur.

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IN THE MATTER OF THE ESTATE OF WALTER J. WENZLAFF, Appellee,	APPEAL FROM THE
LOIS WENZLAFF, Administratrix, Appellee,	PROBATE COURT
A.C. BECKEN CO., a Corporation, Claimant-Petitioner-Appellant.	OF COOK COUNTY

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This appeal is brought by a seventh class claimant in the estate of Walter Wenzlaff, deceased, from an order entered August 16, 1963, in the Probate Court of Cook County, Illinois, denying the appellant's petition to have certain funds declared part of the estate and to have the decedent's widow removed as administratrix of the estate.

The decedent died intestate on January 13, 1962. His widow was issued letters of administration on February 1 of that year. Chapter 3, Section 213a Ill. Rev. Stat. 1961 reads:

> "Except as otherwise directed by the decedent in his will, if any, or except as otherwise provided by law, an executor, administrator or administrator to collect shall have authority, for the preservation and settlement of the estate of a decedent, without personal liability except for malfeasance or misfeasance for losses incurred, to continue the decedent's business during one month next following the date of the appointment, unless the court directs otherwise, and for such further time as the court from time to time may authorize on petition. . . . During the time the business is so conducted, the executor, administrator or administrator to collect, unless otherwise ordered by the court, shall file monthly reports in the Probate Court, setting forth the receipts and disbursements of the business for the preceding month and such other pertinent information as the court may require." (emphasis supplied)

The appellant claims that this section of the Probate Act was violated by the administratrix of this estate in that she continued to run the business of the deceased for more than one month after her appointment.

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It is claimed, therefore, that the administratrix is personally liable for the losses sustained by the business during the period of her unauthorized proprietorship.

The appellant also claims that a joint checking account in the names of the deceased and his wife was part of the estate because the circumstances surrounding the deposits in that account indicates there was no donative intent on the part of the decedent to make a gift of such funds to his wife, or that if such donative intent were established, the law cannot give effect to it because by so doing it would fraudulently deprive decedent's creditors of their rights.

It was established that this account was used primarily for business purposes. All the receipts of the business were deposited here and all the debts of the store were paid with checks drawn from this account. Decedent's widow testified at trial that she had a separate account which she used for household expenses.

There was uncontroverted testimony before the court below that decedent's widow had at various times made substantial deposits in this account, but nothing was brought forth to show when these deposits were made, or their amount.

Finally, the appellant urges that the letters of administration issued to decedent's widow be revoked and that she be removed as administratrix of the estate.

This appeal is taken on behalf of the appellant and all other creditors of the estate similarly situated.

The first item we shall consider is the proper disposition of the joint checking account. There is no doubt but that the account was set up in the form of a joint account; both husband and wife were authorized to withdraw funds from the account and decedent's widow testified that the registration card opening the account stated that it was to be owned jointly with a right of survivorship.

[1] The Supreme Court of this state has held in Frey v. Wubbena, 26 Ill.2d 62, 185 N.E.2d 850 (1962), and In re Estate of Schneider, 6 Ill.2d 180, 127 N.E.2d 445 (1955), that the form of a joint account is not conclusive, and that a court by virtue of its equitable powers may look to the true interests of the parties to determine ownership.

The appellant urges that the account in question was a joint account in form only. It points out that all receipts of the business were deposited to this account and says that it is a form of constructive fraud to permit this asset of the business to be put out of the reach of creditors through the formality of the debtor depositing the business receipts in a joint account with his wife. The appellee, on the other hand, stresses that she had at times made sizeable contributions to that joint account, and urges the proposition that "the use and control by the husband of property belonging to the wife does not make the property subject to the debts of the husband."

In support of this proposition, the appellee cites four cases: Mink v. Crilly, 22 Ill. App. 542 (1887); Rice v. Millard, 42 Ill. App. 282 (1891); Primmer v. Clabaugh, 78 Ill. 94 (1875); and Blood v. Barnes, 79 Ill. 437 (1875). These cases are easily distinguishable from the case at bar. Appellee's cases deal with instances where a wife with her own money bought chattels which she then gave to her husband for use in his business. As the court said in Rice v. Millard (supra), "The personal property claimed here are specific and distinct articles to which the appellee is capable of establishing a clear ownership." The court continued, "This is far from being like a case where a wife furnished her husband with a sum of money to buy a stock of goods and allows him to buy and sell on the trade as if it were his own."

The interest of the courts in these cases seems to be whether the wife bought the property with her own funds and could establish her

ownership of the chattels, and whether the creditors might have been led to believe the husband had property which would be available for the satisfaction of his debts.

In the case before us, the wife cannot establish her ownership of any chattels or of the bank account. At best, she allowed her funds to be comingled with her husband's money in this business account. The cases cited by the appellee say that in this situation, the wife's money would be subject to the husband's debts. Three of the four cases cited by the appellee specifically make this distinction between chattels and money. These cases establish not that the wife is entitled to get her money back, but on the contrary, that whatever money she put in that account is subject to the business debts. If she can prove that she advanced money to the business, then it would seem she could be permitted to file against the estate as a creditor.

[2] We do not say that the arrangement between the deceased and the appellee was collusive or in bad faith in any way. It is not the intent of these people which is controlling here. In our opinion the creditors are entitled to the fund created by the business receipts, and it would constitute constructive fraud to permit the appellee to take this money because her husband put the receipts in a joint bank account. The appellee herself said the account was primarily for business purposes. We hold, therefore, that the funds from this account be returned to the estate of the decedent and made available to satisfy the claims of the creditors. If the appellee can prove herself a creditor of the estate, then she should be permitted to enter her claim in the Probate Court as a seventh class creditor.

The next matter raised by this appeal is whether or not the decedent's widow as adminstratrix of the estate should be ordered to make up the loss sustained by the business while she operated it contrary to the law of this state.

[3] The statute set forth above allows an administrator to continue the business of the decedent for one month. If it is deemed advisable to continue the business past the one month period, the administrator must apply to the court for permission to do so. If the procedures set forth in the statute are met, the administrator is free from personal liability except for malfeasance or misfeasance. It is clear from reading the statute in conjunction with the cases in this state, that the administratrix must recompense the estate for the losses sustained by the decedent's business during the period she operated it without authority of a court.

It is well settled that an administrator must conduct a business according to the statute or incur personal liability for any losses. The administratrix acted at her peril when she continued the business of the decedent for more than one month following the date of her appointment without the permission of a court.

[4] The duty of the administrator is to wind up the affairs of the decedent. Prior to the statutory enactment, the executor had no authority at all to carry on business. Grace v. Seibert, 235 Ill. 190, 85 N.E. 308 (1908). In Peterman v. ~~U. S.~~ United States Rubber Co., 221 Ill. 581, 77 N.E. 1108 (1906), it was held that executors who continued the business of the testator even for the purpose of closing it out are personally responsible for any losses sustained during this period, even though on the whole the estate may have been benefited by the manner in which the business was closed out. The executors there were not permitted to offset the over-all profit made by the business against the losses that were taken on individual sales. See also Chicago Title ~~and~~ & Trust Co. v. Corporation of Fine Arts ~~Building~~, 288 Ill. 142, 123 N.E. 300 (1919).

[5] The statute provides the sole means of carrying on a decedent's business without incurring personal liability for any losses. Connor v.

Allen, 23 Ill. App.2d 240, 161 N.E.2d 871 (1959). The administratrix in the case before us was issued letters of administration on February 1, 1962. She had the power under the statute to carry on her husband's business until March 1 of that year. From that date until April 13 the appellee operated the jewelry store without the permission of a court. She cannot rely, therefore, on the Probate Act for she is clearly outside the terms of the section providing for the continuation of the business of a deceased.

[4] The appellee claims that the belated permission to carry on the decedent's business relates back to March 1, and excuses any loss sustained during the period in question. We cannot agree with this contention. The order of the Court below gave the appellee permission to carry on the business from that date into the future; it could not effect what had transpired before.

The whole purpose of this section is to allow a business to be carried on under the court's supervision. Monthly reports are demanded by the statute so the courts may review the progress of the business to determine whether it would be best for the estate that it be continued or sold. Much of the loss sustained by this store might have been avoided had the Court below been aware of the condition of the enterprise.

Having ignored the mandates of Chapter 3, section 213a Ill. Rev. Stat. 1961, the administratrix has put herself back under the common law of this state; she carried on the business at her peril. Peterman v. United States Rubber Co. (supra), Grace v. Seibert (supra), Chicago Title and Trust Co. v. Fine Arts Building (supra). We hold, therefore, that the administratrix is personally responsible for the losses sustained by the business from March 1, 1962, to April 13, 1962. In the Court below, the profit and loss statement treated the period from January 15, 1962 to April 30, 1962 as a unit, with no month by month breakdown of the finances. The Court below should ascertain as far as possible how

much of the loss was attributable to the period in which the administratrix acted without authority, and charge her only with that amount.

[7] Finally, the appellant asks that the administratrix be removed from her position. Chapter 3, section 276, Ill. Rev. Stat. 1961, reads:

> "On the verified petition of any interested person or upon the court's own motion, the Probate Court may remove an executor, administrator, or administrator to collect for any of the following causes:
>
> . . .
>
> (c) When the executor or administrator wastes or mismanages the estate or conducts himself in such a manner as to endanger his co-executor, co-administrator, or the sureties on his bond."

In two and one-half months of running a small jewelry shop, the appellee lost $3,194.97. This does not speak well of her managerial ability, nor does her continuation of her late husband's business in violation of the law strengthen our confidence in her ability to manage this estate. It seems to us to be in the best interests of all concerned that the Probate Court appoint a new administrator pursuant to Chapter 3, Section 288 Ill. Rev. Stat. 1961.

The order is reversed and the cause is remanded with directions for proceedings not inconsistent with this opinion.

ORDER REVERSED AND REMANDED FOR PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION.

BURKE, P.J., and FRIEND, J., concur.

No. 64-2 Publish Abstract Only July, 1964

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

PEOPLE of the STATE of ILLINOIS, Appellee,	)	Appeal from the
vs.	)	County Court of
WILLIAM WHITLOW, Appellant.	)	Peoria County

Honorable Charles Iben, Presiding Judge

Scheineman, J.

The defendant was convicted of theft of a portable television set, and he has perfected this appeal. His first point is that the evidence fails to prove his guilt beyond a reasonable doubt. The following is a summary of testimony for the prosecution:

Edward Steffen, foreman for Federal Warehouse Co., testified that about 4:50 p.m. on March 27, 1963, he was pulling down the garage door of the warehouse company, when he noticed a light-colored convertible with a black top parked about 20 feet from the garage entrance. There were two men in it, and the defendant was trying to get out on the curb side, but the door was on top of the curb. Defendant was heard to say "the hell with it--let's go".

Steffen says he then observed a boxed television set about 10 feet to the right of the door, whereas general packing material was kept on the left side. Examination disclosed it was unopened and sealed with the factory seal. The boxed set weighed 29 pounds.

Abstract

(151)

(STILL 2-31)

In the

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

PEOPLE of the STATE of ILLINOIS,	
Appellee,	Appeal from the
vs.	County Court of
WILLIAM WHITE,	Fourth County
Appellant.	

Honorable Charles Chen, Presiding Judge

Mr. Justice Lawson, J.

The defendant was convicted of theft of a portable television set, and he has perfected this appeal. The first point is that the evidence fails to prove his guilt beyond a reasonable doubt. The following is a summary of testimony for the prosecution:

Edward Stafford, foreman for Redwood Warehouse Co., testified that about 4:30 p.m. on March 27, 1963, he was walking down the storage door of the warehouse building, when he noticed a light-colored automobile with a black top parked about 30 feet from the entrance walkway. There were two men in it, and the defendant was trying to get out on the curb side, but the door was on top of the curb. Defendant was heard to say "The hell with it--let's go". Stafford says he then observed a brief altercation out about 10 feet to the right of the door, whereas numerous machine accessories were kept on the left side. Examination disclosed it was damaged and sealed with the factory seal. The locked set weighed 15 pounds.

The next morning Steffen and two other employees met in a neighboring office where they could watch the door. All three testified they saw a light-colored car with a dark top come along and park double near the garage. There were four men in it. The defendant got out and walked directly into the garage, the door being open. He disappeared from their sight momentarily, then in a matter of seconds, he came out carrying the boxed set. Another occupant got out of the car and opened the trunk door. As the defendant approached the car carrying the box containing a television set, the three observers rushed at him and ordered him to stop. There was testimony by other witnesses concerning the ownership and possession of the television set.

The defendant testified in his own behalf, and also called several other witnesses, including the three men who were with him on March 28. Their testimony contradicted the people's witnesses in many respects. There was much denial that any of the four had a car with a dark top on the specified dates. A substantial part of the defense was that defendant could not have been present at the warehouse on the afternoon of March 27, for he had a number of alibi witnesses covering the time. The four in the car the next morning testified they had planned to do some yard work and had stopped at the warehouse to pick up some empty boxes to be used as trash receptacles; that the defendant had gone into the garage and picked out a couple of small boxes, then picked up the large box and started to shake it when the three employees rushed up to him; that he had not carried anything out of the garage.

When a defendant goes to trial before a jury, it is reasonable to expect there will be contradictory testimony. It is the peculiar province of the jury to weigh the testimony and determine the credibility of witnesses. People v. Wilson, 1 Ill. 2nd 178. The testimony for the people in this case was clear and consistent. For a reviewing court to disturb a verdict of guilty, the evidence must

-2-

be palpably contrary to the verdict, or so unreasonable, improbable, or unsatisfactory as to justify the court in entertaining reasonable doubt as to defendant's guilt. People v. Leach, 398 Ill. 515; People v. Carter, 410 Ill. 462; People v. Horton, 4 Ill. 2nd 176; People v. Stevens, 11 Ill. 2nd 21. We find nothing unreasonable, improbable, or unsatisfactory in this case.

On rebuttal the people produced evidence intended to impeach the defendant by proof of prior convictions of felonies. One was in Peoria County in January, 1949 (defendant was granted probation). The court admonished the jury this evidence did not bear on the substance of the information, it was admitted for a limited purpose only, as a test of credibility of the defendant. There was also proof of a conviction in Henry County in 1951, as to which the court again admonished the jury. This one is again referred to hereafter.

Another alleged error is that the court gave an instruction about the testimony of an accomplice. The transcript of the conference on instructions discloses that when this instruction was presented, defense counsel announced "no objection", and the court then ruled it would be given. The instruction, therefore, is not subject to review. People v. Miller, 20 Ill. 2nd 496; People v. Stevens, 11 Ill. 2nd 21.

Finally, an attack is made on people's Exhibit 7 which contained duly certified copies of records in Henry County showing the felony, prosecution, and sentence on a plea of guilty of William Whitlow in November, 1951. These documents were in due form for proof of conviction, for the purpose of impeachment. The forwarding clerk had also included in the same cover a petition for probation and a report of the probation officer. The latter is highly derogatory of the defendant and would be improperly prejudicial to the defendant if given to the jury.

The prosecuting counsel insist that these documents pertaining to probation were not read to the jury, as indicated by penciled x's

at the beginning and end of each document, to show they were omitted. The defense insists that the record shows the documents were read to the jury. The state's attorney's staff did not see the report of proceedings or record on appeal prior to the filing thereof, so there was no way for them to question the correctness thereof until after the entire record was filed in the Appellate Court.

The official court reporter did not take down verbatim what was read to the jury, but merely included in the transcript a statement that Exhibit 7 was admitted and read to the jury and "is a part of this record". This is a reference to the original exhibit and is not conclusive as to whether all was read or parts omitted.

Other matters in the record before us indicate this prejudicial document was not read to the jury. First, we refer to the defense's objection to Exhibit 7 at the trial. It is partly confused, since there is a statement that this is an endeavor to create prejudice against the boy "by reason of something that happened 15 years ago". The Peoria offense was in 1948, which was just about 15 years prior to this trial, but the Henry County case was tried more than two years later.

Otherwise the objection was general in character. It was to the effect: no foundation, immaterial, no bearing on this case, no probative value, not timely, new evidence, not the purpose of rebuttal, "highly prejudicial and wrong to admit it at this time".

The document would be prejudicial and wrong at any time, it could never be "timely". It is conspicuous that no reference was made in the objection to opinions and conclusions based on an ex parte investigation. It becomes apparent that counsel then knew this part was not to be read to the jury. No further comment or motion was made after the rest of the exhibit was read to the jury.

Next, we refer to defendant's motion for new trial. There are three specific grounds stated, one concerns the place of the television and two others refer to instructions. There are nine other generalities having no value on appeal, including one that "The court erred

in the matter of overruling objections". There is not one word about Exhibit 7 or about giving the jury opinions based on ex parte investigations.

After the motion for new trial was heard and denied, the defense obtained leave to file a motion in arrest of judgment. This motion includes only generalities, one being a statement that the matters in the motion for new trial are incorporated. Again, there is no mention of Exhibit 7 or the contents thereof.

It is apparent that defendant's trial counsel was aware that the prejudicial document was not read to the jury. Months later, when other attorneys, who were not present at the trial, read the reporter's minute that Exhibit 7 was read to the jury, they had a different idea.

The situation here presented is analagous to one in which it is sought to amend or correct a judgment after the expiration of 30 days. The rule that applies is that the correction of the report of proceedings must be based on some note or memorandum from, (a) the records or quasi-records of the court, or (b) the judge's minutes, or (c) an entry in a book required by law to be kept, or (d) in the papers on file in the case, and that it cannot be determined solely from the memory of the witnesses or the recollection of the judge. People v. Hall, 407 Ill. 137; People v. C. B. & Q. R. R., 316 Ill. 482.

The part to be corrected to speak the truth is the court reporter's note "which said People's Exhibit No. 7 admitted into evidence and read to the jury, is a part of this record".

As noted, Exhibit No. 7 reveals certain x's "in pencil on the face thereof". It is undisputed that these were placed on the exhibit prior to offering it in evidence and were intended to be marks of exclusion under the general rule above cited, In order to authorize the trial judge to correct the report of proceedings, there must be a memorandum by which the trial judge is able to determine that there was, in fact, an error in the transcription as made by the court reporter. Two of the accepted synonyms of the word

"memorandum" are "something designed to preserve the memory of a person", and "a reminder". Here the memorandum appears on the face of the exhibit in the form of "x's". The testimony on the hearing is merely corrobative of a memorandum which satisfied the court that the report of proceedings should be corrected.

There being no reversible error shown, the judgment is affirmed.

JUDGMENT AFFIRMED

Culbertson, P. J. and Roeth, J. concur

No. 64-34

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, EX REL, JOAN JULIA FORTUNE, Appellee, vs. THOMAS JOSEPH DWYER, JR., Appellant.	)	Appeal from the Circuit Court of DuPage County.

ABRAHAMSON, P. J.

This is a proceeding under the provisions of the Paternity Act (Ill. Rev. Stat. 1961, Chap. 106 3/4, Sec. 51, et seq.) in which the court entered judgment in keeping with the jury's finding that the defendant was the father of the relator's child.

A paternity proceeding has the appearance of a criminal prosecution, especially as the State's Attorney represents the relator, but in substance and in fact it is a civil proceeding for the recovery of money. LaLacker v. Stuckey, 1963, 40 Ill. App. 2d 341, 189 N. E. 2d 676; People v. White, 1960, 26 Ill. App. 2d 279, 168 N. E. 2d 48, and is governed by the provisions of the Civil Practice Act, Cornmesser v. Laken, 1963, 43 Ill. App. 2d 324, 193 N. E. 2d 337.

No. 84-34

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, ex rel. JOAN JONIA FORTUNE,	)	
	)	
Appellee,	)	
	)	
vs.	)	Appeal from the
	)	Circuit Court of
THOMAS JOSEPH DWYER, Jr.,	)	DuPage County.
	)	
Appellant.	)	

ABRAHAMSON, P. J.

This is a proceeding under the provisions of the Paternity Act (Ill. Rev. Stat. 1981, [illegible] 105 3/4, [illegible] 51, et seq.) in which the court entered judgment in favor of the plaintiff, finding that the defendant was the father of the relator's child.

A paternity proceeding has the appearance of a criminal prosecution, especially as the State's Attorney represents the relator, but in substance and in fact it is a civil proceeding for the recovery of money. Dunlap ex rel. Bolicke, 1963, 40 Ill. App. 2d 341, 189 N. E. 2d 870; People v. White, 1960, 30 Ill. App. 2d 279, 168 N. E. 2d 442, aff'd, Cornmesser v. Lakin, 1963, 43 Ill. App. 2d 324, 193 N. E. 2d 37).

The abstract filed by the defendant contains no reference to a notice of appeal, and, although not obliged to do so, we searched the record but were unable to find that most essential document or any reference to it. What is more, the defendant's praecipe for the record did not request the Clerk to include that document in the record on appeal. In Ellet v. Wyatt, 345 Ill. App. 420, 422, 103 N. E. 2d 526 (4th District 1952) it was stated that the abstractor should show the jurisdictional steps in connection with the appeal, including the dates of the entering of judgment and notice of appeal, but a failure to do this should not require dismissal of the appeal unless the failure can be seen to be of a flagrant character.

There is no indication in the record before us or in the briefs that a notice of appeal was filed. The filing of a notice of appeal within the period limited by statute is mandatory and jurisdictional. McHale v. Marrs, 48 Ill. App. 2d 171, 197 N. E. 2d 736. We determine that the failure to include in the abstract, record, briefs or arguments the notice of appeal or any reference to it to be of a flagrant character and this court has no jurisdiction to hear this cause. There is no appeal here and nothing to dismiss. The appropriate procedure is to strike the cause from the docket, Chicago Housing Authority v. Frank, 335 Ill. App. 456, 460, 82 N. E. 2d 205 (1st District 1948), Wishard v. School Directors, 279 Ill. App. 333, 335, (4th District 1935), Veach v.

The abstract filed by the defendant contains no reference to a notice of appeal, and, although not obliged to do so, we searched the record but were unable to find that most essential document or any reference to it. What is more, the defendant's praecipe for the record did not require the Clerk to include that document in the record on appeal. In Siller v. Wyatt, 345 Ill. App. 410, 412, 103 N. E. 2d 320 (4th District 1952) it was stated that the abstractor should show the jurisdictional steps in connection with the appeal, including the dates of the entering of judgment and notice of appeal, but a failure to do this should not require dismissal of the appeal unless the failure can be seen to be of a flagrant character.

There is no indication in the record before us or in the briefs that a notice of appeal was filed. The filing of a notice of appeal within the period limited by statute is mandatory and jurisdictional. McHaney v. Marks, 8 Ill. App. 2d 171, 107 N. E. 2d 760. We determine that the failure to include in the abstract, record, brief or argument the notice of appeal or any reference to it to be of a flagrant character and this court has no jurisdiction to hear this cause. There is no appeal here and motion to dismiss. The appropriate procedure is to strike the cause from the docket, Chicago Housing Authority v. Evans, 3 Ill. App. 450, 410, 82 N. E. 2d 209 (1st District 1948). Wieland v. School Directors, 279 Ill. App. 383, 385, (4th District 1935), Vecsey v.

Hendricks, 278 Ill. App. 376, 378 (4th District 1935), and it is so ordered.

CAUSE STRICKEN.

CARROLL, J. and MORAN, J. concur.

55 I.A.2 210

49845

MARJORIE HAGEL,	)	
	)	
Plaintiff-Appellant,	)	APPEAL FROM THE
	)	
v.	)	SUPERIOR COURT OF
	)	
STATE-WIDE INSURANCE AGENCY, INC., JOHN NUZZO and VICTOR NUZZO,	)	COOK COUNTY.
	)	
Defendants-Appellees.	)	

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal from a summary judgment in favor of defendants in a suit in which the plaintiff seeks to recover the sum of $11,235.20 which she paid to defendant State-Wide Insurance Agency, Inc., (State-Wide) in discharge of a debt owing to it by her deceased husband. Plaintiff makes charges of lack of consideration, fraud and other matters hereinafter enumerated, and the question to be determined is whether there was a genuine issue of fact presented.

Plaintiff's husband was an insurance broker who placed insurance business with State-Wide. In that capacity he had collected the amount aforesaid as premiums from persons to whom he had sold insurance. He became ill and instead of using the money so collected for the payment of such premiums, he diverted the funds to pay his personal expenses. When this was discovered, State-Wide paid the premiums in order to avoid the lapse of policies, receiving the promise of plaintiff and her husband that they would pay State-Wide back. Plaintiff's husband had a policy on his life in the sum of $25,000 with the American National Insurance Company (American) which was originally a party defendant to this suit, but was dismissed upon its answer that it had paid the full amount of the death benefit of the policy and that the policy had been surrendered.

John Nuzzo and Victor Nuzzo are officers and agents of State-Wide. John Nuzzo is also an agent of American.

Following Chester Hagel's death, one of the Nuzzos met with plaintiff. He gave her a check for $25,000 in payment of the amount due on her husband's life insurance policy with American, which check the plaintiff endorsed and returned to him. He had with him two other checks, both issued by John Nuzzo and payable to plaintiff. One, in the sum of $11,235.20 representing the amount of her husband's indebtedness to State-Wide, plaintiff endorsed and returned to him. The other check in the sum of $13,764.80 representing the difference between $25,000 and her husband's indebtedness, plaintiff retained. This discharged her husband's indebtedness to State-Wide and her obligation to pay it.

Both the plaintiff and the defendants made motions for summary judgment. On such motions, the pleadings, depositions, admissions and affidavits are all to be considered, and the question is whether a genuine issue of fact exists. Par. 57, subparagraph (3), Civil Practice Act (Ill. Rev. Stat., ch. 110, § 57(3) (1963)).

Following her husband's death, State-Wide as part of its understanding with the plaintiff agreed to handle the insurance business of her late husband, and for three years following his death to pay her a commission on all his renewal business, as well as on any business which plaintiff might refer to it. Pursuant to this agreement plaintiff obtained an insurance sales permit. During the conference in which this arrangement was concluded, plaintiff undertook to and subsequently did file proof of death and claim forms

necessary to obtain the proceeds due under her husband's policy with American.

While plaintiff in her pleading denied that she made any promises to State-Wide, her testimony on deposition is to the contrary. Defendants' motion for summary judgment incorporated portions of plaintiff's discovery deposition. On the question as to whether plaintiff had promised State-Wide to pay it the amount it had advanced for payment of the delinquent premiums, plaintiff testified:

> "I had said to them at one time - I don't remember when it was - that I had said that if I could sell the apartment building - because I had these hospital bills which I had to take care of - that I would see that I could take care of his [debts]...."

Plaintiff acknowledged that after her husband's death she authorized State-Wide, pursuant to her agreement with it, to conduct the business and to pay her a commission of fifty percent for a period of three years. This agreement was made sometime in August 1961, and until December 1962 the plaintiff received commissions. After that date she did not receive any, but she makes no claim that any are due. Plaintiff further said that she had made a demand on the Nuzzos for the return of the $11,235.20; that it was not too long before the July 10, 1963 deposition; that she talked to her lawyer, who advised her she did not have to assume her husband's debts after his death; and that this really was the basis of her claim. As to whether Nuzzo ever told her she had to pay this amount, plaintiff said:

> "I can't truthfully say one way or the other exactly what it was he did say to me;..."

She acknowledged that he did not use force nor did he "twist her arm" at the time the transaction in question was made. She

further said she was familiar with check procedure and that the first time she consulted her attorney was when she had problems with her husband's creditors who wanted her to open an estate.

Plaintiff argues that the agreement to pay any pre-existing indebtedness of her deceased husband to State-Wide was without consideration. Even if plaintiff was under no legal obligation to pay the debts of her husband, there was sufficient consideration for the agreement. Plaintiff, by agreeing to pay her husband's business debts, obtained State-Wide's agreement not to cancel the insurance policies hereinbefore referred to and in return for authorization to conduct her husband's business, State-Wide agreed to pay the plaintiff fifty percent of the commission on the policies. This was sufficient consideration to support the contract.

The statute of frauds is invoked by plaintiff (Ill. Rev. Stat., ch. 59, § 1 (1963)) which provides in part as follows:

> "That no action shall be brought...to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another...unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some person thereunto by him lawfully authorized."

It is obvious from an examination of the statute that it is to be used as a defense - a shield rather than a sword. The contract has been completely executed and the money paid to the defendants and the statute of frauds is no longer applicable. Siegel, Cooper & Co. v. Robbins, 67 Ill. App. 296.

Plaintiff charges false and fictitious representations, want of good faith, unjust enrichment, unconscionable conduct and undue advantage taken of her. This is a grouping of harsh

charges. However, not only her testimony on pretrial deposition, but her attorney's statement to the trial court reveals no sound basis for such charges. The court inquired of plaintiff's attorney about the nature of the charge, and the following colloquy occurred:

"The Court: It seems to me from my memory from reading your complaint here that you allege she was fraudulently induced to give her consent, more or less?

Mr. Green: Yes.

The Court: Is that what you are trying to say?

Mr. Green: Well, in effect, yes. I don't like to use the word 'fraud'---

The Court: Well, do you allege any factual misrepresentation by anybody at that time?

Mr. Green: No. We allege that she was under the impression ---

In other words we do not say that had she not signed the check they wouldn't have given her the other check. But we do say she signed it thinking she had to sign it in order to get the other check. (Emphasis supplied.)

Mr. Castanes: Well, Counsel, there again is the same type ---

Mr. Green: (Continuing) There is not too much fraud here. I don't know that there was fraud."

What we have hereinbefore said applies also to plaintiff's charge that defendants have been unjustly enriched by the transaction and should be forced to return the money to plaintiff.

If we were to find for plaintiff, State-Wide would have lost the moneys it had advanced and plaintiff would have received the benefit of the agreement she made with it. It is difficult to see how any charge of unjust enrichment could be made on these facts. Broad generalities are frequently used in both

authorities and texts in discussion of unjust enrichment, but when the cases are examined it will be seen there are always elements of fraud or fiduciary relationship involved. None of the cases cited by defendants bears any resemblance to the case at bar.

Plaintiff argues that no necessity is shown for the issuance of three checks in the transaction. Whether this was done to clear the transaction so far as American was concerned or for other reasons is of no consequence, since the result was to give plaintiff the proceeds of that policy, less the amount she owed State-Wide.

There is much to support defendants' contention that plaintiff is prosecuting the litigation upon pressure from other creditors of her husband, and this explains the inconsistencies of her position. She acknowledged in her deposition that the first time she discovered that she was not liable for the debts of her husband was when she went to an attorney because of the problems she was having with her husband's creditors who wanted to open an estate. She further acknowledged that the basis of her suit was that she should not have paid Nuzzo the amount of money for her husband's debts.

Plaintiff urges that we cannot consider the discovery deposition on appeal because there is no evidence in the record as to whether she ever signed the deposition or whether she waived signature. Plaintiff did not include this point in opposition to the motion for summary judgment, did not urge it in the trial court, and does not include it in the Points and Authorities of her brief. It is a highly technical point, for

it is common practice in this jurisdiction to waive signature at the conclusion of a deposition and thus avoid the necessity of having the deponent return for that purpose. The record is silent on this point. We consider it waived. There is no complaint that there is any inaccuracy here, and the portion of the deposition used was put in evidence as an admission. This is proper practice. Section 57 of the Civil Practice Act (Ill. Rev. Stat., ch. 110, § 57 (1963)); Meier v. Pocius, 17 Ill. App. 2d 332, 150 N.E.2d 215. It is not necessary to set out the full discovery deposition in a motion for summary judgment. Kamholtz v. Stepp, 31 Ill. App. 2d 351, 176 N.E.2d 388.

We agree entirely with plaintiff's proposition that summary judgment procedure is not designed to try an issue of fact. It is used for the purpose of determining whether a genuine issue exists. If, upon examination, the pleadings, deposition and admissions on file, together with affidavits, if any, show no genuine issue of material fact, the moving party is entitled to summary judgment. The trial court subjected the broad general averments of the second amended complaint to the more revealing nature of the case, as shown upon the hearing of the motion for summary judgment. This is precisely the kind of case for which a summary judgment proceeding is designed. There is no genuine issue of fact involved in the instant case.

The judgment of the trial court is affirmed.

Judgment affirmed.

Dempsey, P.J., and Sullivan, J., concur.

Abstract only.

A

49680

55 I.A.2d 371

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM CIRCUIT COURT
v.	)	OF COOK COUNTY
JOHN HOPKINS, Defendant-Appellant.	)	CRIMINAL DIVISION

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

The appellant, John Hopkins, was sentenced on May 15, 1959, to the Illinois State Penitentiary for two to ten years after he pleaded guilty to the illegal possession of narcotics. At the time of this trial, the appellant was serving a sentence in the Federal penitentiary for another conviction of the illegal possession of narcotics. The offense on which the State conviction is based occurred while the appellant was on bail pending an appeal to the Federal Circuit Court of Appeals.

The sentencing judge sentenced the appellant to a term of not less than two years nor more than ten years. No mention was made at sentencing as to whether the time the appellant was to serve in the Federal penitentiary would count as part of the sentence passed under State law. The appellant insists that under these circumstances the two sentences are to run concurrently. This is the sole point of law relied on by the appellant in the brief which he prepared himself.

In support of the proposition urged, the appellant cites several Illinois decisions. The latest of the cases cited in this brief is People v. Toomer, 14 Ill.2d 385, 152 N.E.2d 845 (1958). In that case the Supreme Court held, "It is well established that two or more sentences to the same place of confinement run concurrently, in the absence of specific provisions to the contrary appearing in the judgment order. . ." All the Illinois cases cited by the appellant make the same point: sentences to the same place of confinement will

run concurrently unless there is a specific provision to the contrary. The sentences in this case were not to the same place of confinement and do not fall within this rule.

We believe the case to be controlled by the decision of the Supreme Court in People v. Ragen, 396 Ill. 554, 72 N.E.2d 311 (1947). In that case it was held that where a prisoner of a Federal penitentiary was sentenced by a court of this State and nothing was said as to whether sentences were to run concurrently, the sentences did not run concurrently. This decision was based on the fact that the sentences were imposed by two different sovereignties and also because the places of confinement were different. The case at bar clearly falls under the rationale of the opinion in the Ragen case, (supra). The proposition urged by the appellant is without merit. The judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and LYONS, J., concur.

50168

55 I.A.2 371

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RAYMOND LEE, Defendant-Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

Raymond Lee appeals from his conviction of robbery in the Circuit Court of Cook County, Illinois, Criminal Division, entered October 10, 1963. It is claimed that the evidence adduced by the People is insufficient to support the conviction of the crime charged in the indictment. The appellant insists he is not guilty of any crime, but also urges that assuming some crime were committed, the only evidence was that of larceny and not robbery.

The People's main witness was Abe Chester. He testified he ran a clothing store at 1523 West 69th Street in Chicago and that on June 24th, 1963, at about 6:40 in the evening, the appellant and one Roosevelt Nolan entered his store and began to look at some trousers. Then, according to Chester, Nolan grabbed a pair of scissors and threatened the witness, telling him to lie down on the floor and be quiet. Chester testified further that Nolan and the appellant, Lee, seized quite a few articles of clothing and ran out of the store.

Richard Dunlap testified for the People that he was standing in front of Chester's store at the time of this occurrence and that he saw two men carrying clothes run out of the store and down an alley. He identified the men as Nolan, and the appellant, Lee. Dunlap testified further that he chased the appellant and when he saw a police squad car, flagged it down. He was present when the appellant was taken into custody and testified that Lee threw down several pair of pants just before the police seized him.

The defense put Roosevelt Nolan, the appellant's companion, on the stand. He testified that he entered a plea of guilty to the indictment then on trial. According to Nolan, he and the appellant had been drinking that day and without any plan in mind, had gone into the store to look at some pants. Nolan said he had an argument with Chester, and that he had grabbed a scissors, snatched up some suits and ran out of the store. He testified that there had been no plan to rob the store when they went in.

Finally, the appellant testified in his own behalf. He said he was married and the father of two children. He had worked at the Edgewater Beach Hotel and at the time of the robbery was attending the Allied Trade School. He said that when Nolan grabbed the scissors and threatened Chester, he simply turned and ran.

> "Like he stated before, I had been to the penitentiary for armed robbery with a pistol and I didn't want to get involved in anything of this sort because since I have come from the penitentiary I have been going straight, I have been working plus and I was going to school and I didn't want any part of it."

Appellant testified he was not aware he was carrying pants when he ran out of the store until he had run ten blocks.

There was sufficient evidence to support the finding that appellant was guilty of robbery. The two men had come into the store together, one of them threatened Chester with a scissors and both men ran out of the store with clothing. Chester testified he never heard the appellant say anything to Nolan in opposition to the crime while the robbery was going on. There was enough evidence to counter-balance the appellant's claim he ran ten blocks before he was aware he was carrying pants. The physical actions of these two men were those of persons acting in concert to commit a robbery. The Court below did not have to believe the testimony of the appellant that he did not intend to participate in the crime. This case being tried without a jury,

falls directly within the ruling in People v. Clark, 30 Ill.2d 216, 219, 195 N.E.2d 631 (1964):

> "Where the cause is tried without a jury, it is the function of the trial court to determine the credibility of the witnesses and the weight to be afforded their testimony and where the evidence is merely conflicting, a reviewing court will not substitute its judgment for that of the trier of fact."

The appellant claims he cannot be found guilty of robbery because his acts do not fall within the statutory definition of that crime. "A person commits robbery when he takes property from the person or presence of another by the use of force or by threatening the imminent use of force." Ill. Rev. Stat., 1963, Ch. 38, Par. 18-1. The appellant points out that all the evidence shows it was Nolan who had the scissors and forced the shop owner to lie down. From this he argues he did not take goods from the possession of another by force. This argument has been refuted by the courts of this state for many years.

> "It is also urged that the conviction is erroneous because the indictment charged that each of the plaintiffs in error was then and there armed with a dangerous weapon, to-wit, a certain revolver, and the proof failed to show that either Campbell or Crane was armed with a revolver. We think the evidence clearly showed that all four of the plaintiffs in error visited the office of the Hunding Dairy Company with a common purpose, and that three of them, at least, were armed with revolvers at the time and used the same to coerce the employees of the dairy company into giving up the money, and therefore they are, at the least, accessories before the fact to the aggravated offense of robbery with a dangerous weapon and could rightly be indicted and convicted as principals." People v. Cunningham, 300 Ill. 376, 381, 133 N.E. 270 (1921).

When he found the appellant guilty of robbery, the Court said, "I couldn't come to any other conclusion except they were working in concert."

The latest decisions of the Supreme Court continue this reasoning. In People v. Cole, 30 Ill.2d 375, 379, 196 N.E.2d 691 (1964) the court says:

". . . circumstances may show there is a common design to do an unlawful act to which all assent, and whatever is done in furtherance of the design is the act of all, making each person guilty of the crime."

The judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and LYONS, J., concur.

49915

(55 I.A.2d 372)

A

PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. EDWIN WILLIAMS, Appellee.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

The People have appealed from an order entered May 29, 1964, in the Circuit Court of Cook County, Criminal Division, granting the motion of Edwin Williams to quash a search warrant on the basis of the contents of the return.

The facts can be stated simply. A warrant was issued on January 22, 1964, for a search of the premises located at 15338 Park Avenue, Harvey, Illinois. The items to be seized are described as "gambling equipment and paraphernalia including records of bets and equipment used in bookmaking." The search produced one telephone, two checks, some currency and a scratch sheet. Apparently no claim was made in the court below that the warrant was issued without probable cause.

We do not deem it necessary to discuss the case at length as the defendant has failed to file a brief as required by Rule 7 of this court.

People v. Nardone, 43 Ill. App.2d 409, 193 N.E.2d 617 (1963). We will simply say that the warrant was issued for probable cause, is not irregular on its face and states the place to be searched and objects to be seized. The articles seized fall within the description in the warrant. The order sustaining the motion to quash the search warrant is reversed and the cause is remanded with directions to deny the motion to quash the search warrant.

ORDER REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

BURKE, P.J., and LYONS, J., concur.

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Abstract

No. 64-39

55 I.A.2 373

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

Abstract

373

A

Bituminous Casualty Corporation, an Insurance Corporation, Plaintiff and Counter Defendant-Appellee, vs. Lou Bachrodt Chevrolet, a Business Corporation, Defendant and Counter Plaintiff-Appellant, and Lou Bachrodt Chevrolet, a Corporation, Third Party Plaintiff-Appellant -vs- John H. Camlin Co., an Illinois Corporation, Third Party Defendant-Appellee.	Appeal from the Circuit Court of Winnebago County.

DAVIS - J

Abstract

The issues presented in this case are largely factual, the parties litigant are in accord on the governing principles of law, but they differ in the application of such law to the facts.

The plaintiff, Bituminous Casualty Corporation, brought this action to recover from the defendant, Lou Bachrodt Chevrolet, certain insurance premiums allegedly remaining due it under a workmen's compensation policy and a comprehensive liability policy covering the defendant during the term, February 1, 1960 to February 1, 1961. The defendant answered denying the material allegations of the complaint and counterclaimed alleging that the plaintiff through its agent, the John H. Camlin Co., herein called Camlin, a local insurance agency, represented that the premiums would be different than those ultimately charged and would be subject to a certain premium reduction plan. The defendant also filed a third-party complaint against the agent Camlin, re-alleging the matters set forth in the counterclaim. Plaintiff and Camlin answered the counterclaim and third-party complaint. They admitted that Camlin represented to defendant that it would procure the insurance coverage in question, and denied the allegations as to premiums. These answers alleged further affirmative matters which are substantially set forth in the subsequently stated testimony of Glenn Mosser.

Upon trial before the court without a jury, judgment was entered for the plaintiff on its complaint against the defendant, in the sum of $6,715.40 and costs, and against the defendant, on both its counterclaim and third-party complaint.

As to Camlin, the defendant's theory on the third-party complaint is that Camlin is liable to it for any damages suffered

by it, by reason of the failure of Camlin, as its agent, to obtain the insurance requested, or to advise defendant that the so-called premium reduction plan was not a part of the new insurance program. As to the plaintiff, the defendant's theory on its counterclaim is that Camlin was simultaneously acting as agent for both the plaintiff and the defendant; and that the plaintiff, therefore, cannot recover on its complaint, and should be liable upon the counterclaim under the theory of respondeat superior for the misrepresentations and omissions of Camlin.

From the pleadings and evidence in this case, it appeared that in December of 1953, the defendant purchased the Chevrolet dealership in Rockford. Among the assets acquired was unexpired insurance which had been obtained by the prior owner from Glenn Mosser, president of Camlin. Mr. Bachrodt, president of the defendant, met Mosser and continued these policies, including workmen's compensation and garage liability, in force. They expired within the year and Bachrodt then directed Mosser to obtain these coverages through the Employers Mutual of Des Moines, Iowa, the company with which defendant had previously been insured. Employers Mutual then insured defendant until February of 1959, renewing the policies annually. Each of the garage liability insurance policies contained what was called a premium reduction plan.

Bachrodt testified that in the latter part of 1958, he became dissatisfied with the manner in which the Employers Mutual had computed their reserves and losses. The computation resulted in a premium which Bachrodt believed to be excessive. He also testified that since he no longer had any business associations in Des Moines, the city of his prior

residence, he wanted to bring the insurance business to Rockford. The evidence further indicated that the Employers Mutual had advised that they would refuse to continue insuring defendant after the policy expirations in February of 1959, because of the bad loss ratios experienced in prior years.

Mosser then obtained the workmen's compensation and garage liability coverage for defendant through the Ohio Casualty Insurance Company. This company insured defendant from February of 1959 to February of 1960, and prior to the expiration of the term year, advised that it did not wish to renew the policy because of the bad losses sustained. At the request of Mosser, they did, however, submit a plan under which they would insure defendant. This plan was at a substantial premium increase and was not acceptable to defendant. The Ohio Casualty garage liability policy also contained the premium reduction plan, which had been a part of the previous garage liability policies.

Bachrodt then asked Mosser to seek another insurer for defendant's compensation and garage liability insurance. Mosser then obtained a proposal from the plaintiff, Bituminous Casualty Company, with premiums at a certain penalty rate, over and above the ordinary or standard rate. These penalty rates were less, however, than the penalty rates submitted by Ohio Casualty Company, if it were to continue to carry the workmen's compensation and garage liability coverage.

At a meeting at Bachrodt's office in January of 1960, Mosser reviewed the premium rates and premium program with Bachrodt. Mosser explained that the premiums would be subject

to a plan called "Retrospective Premium Plan 'D'". The Retrospective Premium Plan was a plan under which at the end of the term of the insurance, and after the actual loss sustained in carrying the insurance had been ascertained, a stipulated formula was then applied to the loss experienced. A good loss ratio would result in a refund of the advanced premiums paid by the insured; a bad ratio would result in an additional penalty, which could be as great as 50% of the original advanced premiums.

The operation of this plan was explained to Bachrodt by setting forth several theoretical examples on scratch paper, showing the ultimate premiums under several assumed loss situations. There was no discussion regarding the premium reduction plan which had been a part of Bachrodt's previous garage liability policies. Bachrodt did not ask Mosser whether this was a part of the new premium program and Mosser did not at any time mention the premium reduction plan.

Bachrodt accepted the proposal and the policies were issued and delivered to defendant about February 1,1960. The advanced premiums, totaling $11,821.60, were payable throughout the year by defendant, the last installment being payable in December of 1960. All of these advanced premiums were paid. Bachrodt testified that in November of 1960, while an insurance audit was being made for defendant, he first discovered that the premium reduction provision which had heretofore been a standard part of the garage liability endorsement was "x'd" out and marked "voided". It was then that he became aware that the premium reduction plan was not a part of the premium program.

He further testified that he had at all times assumed that this was a part of the policies. Upon making this discovery, he discussed the matter with Mosser, who showed him where the premium reduction plan was "x'd" out. Thereafter defendant paid the advanced premium installments due in December and continued the policy in force until the expiration of its term in February of 1961. By October of 1961, the loss experience under the coverage had been determined and the retrospective adjustment made pursuant to the Plan "D" Endorsement. This resulted in an additional premium to defendant in the sum of $6,715.40, which amount it refused to pay.

There is absolutely no evidence to support the defendant's pleadings that plaintiff, through its agent, Camlin, made representations that the premium plan was to be anything other than that ultimately submitted or made representations that the premium reduction plan was to be a part of these policies. Both Mosser and Bachrodt said that neither made mention of the premium reduction plan. Bachrodt testified that he merely assumed that this was to be a part of the policies. The only representations testified to were those at the meeting in January of 1960 at which both the premium rate and the "Retrospective Plan 'D'" were both fully discussed. There is no evidence that any other type of premium plan was at that time offered or discussed.

Defendant apparently tried the case upon the theory that Mosser had a duty to disclose to Bachrodt that the premium reduction plan was not to be a part of the policies. If an agent in procuring insurance for his principal does not

follow the instructions when obligated so to do, or if the policy obtained is void or materially defective through fault of the agent, or if the principal otherwise suffers damage by reason of any mistake or act of omission or commission of the agent which constitutes a breach of duty to his principal, he is liable to his principal for any loss the principal may have sustained thereby. Johnson v. Illini Mutual Insurance Co., 18 Ill. App. 2d, 211, 216 (3d Dist. 1958); Shapiro v. Amalgamated Trust and Savings Bank, 283 Ill. App. 243, 246 (1st Dist.1935); The Evan L. Reed Manufacturing Company vs. Wurts, 187 Ill. App. 378, 385-386 (1st Dist. 1914).

It is abundantly clear from the record that the displeasure of Bachrodt with the previous two insurers, Employers Mutual and Ohio Casualty, rested on the premiums proposed and charged defendant. It is equally evident that these premiums were the result of the bad losses experienced in carrying these risks, and that the Employers Mutual refused to continue to insure defendant and the Ohio Casualty agreed to insure it only upon raising premium rates to a level which were unacceptable to the defendant. This being so, Bachrodt instructed Mosser to try to find more "suitable coverage". From what had transpired earlier, it is apparent that the more "suitable coverage" meant not a change in the type of compensation or liability coverage, but a change in the premium plan.

Mosser then obtained a proposal from the plaintiff, Bituminous, and reviewed the premium plan in detail with Bachrodt. At the meeting in January of 1960 between Bachrodt and Mosser, it appears that the only matters discussed were the premiums to be charged and the method of computing them. Mosser explained that the premiums were to carry a 15% debit

(a penalty premium over the standard rate) on the workmen's compensation and a 25% debit on the garage liability. This represented a substantial reduction from the proposal submitted by the Ohio Casualty Company. Mosser further stated that these premiums would be subject to a premium adjustment plan called "Retrospective Premium Plan 'D'" and explained the operation of this plan, in detail, through a number of theoretical examples heretofore mentioned.

The explanation made to Bachrodt was presented as the entire premium plan. He found this acceptable and ordered the insurance placed. Nothing in this record warrants or justifies the assumption by Bachrodt that the premium reduction plan embodied in defendant's prior garage liability policies would again be in this policy. This was a new and entirely different premium plan obtained, at the direction of Bachrodt, to find a more "suitable" insurance program. The rather detailed explanation by Mosser of the program illustrated fully that the premiums under the new program were flexible and depended on the actual loss experience occasioned during the year. This was no longer the typical guaranteed cost plan contained in the prior policies, to which the premium reduction provisions applied. There was, hence, no duty in Camlin to specifically advise Bachrodt that the premium reduction plan was not to be a part of the new policies. Certainly, under Bachrodt's instructions to Camlin, there was no duty to obtain insurance containing the premium reduction plan.

In each of the cases cited by the defendant there was either an act of omission or commission on the part of the

agent which resulted in his principal not receiving the insurance coverage requested. In a number of the cases there was the added element of the agent, through some act or action, having lead the insured to believe he was properly covered. Those cases which hold that the agent is liable for any damage suffered by the principal, due to a breach of duty on the part of the agent and which hold that the principal has the right to rely on the presumed obedience of the agent in carrying out the instructions, are factually inapplicable to this case. We here hold that Camlin was guilty of no disobedience in that it followed the instructions of Bachrodt in obtaining the insurance coverage under a different premium plan and in that it fully and thoroughly explained the method of computing the premiums due under this plan.

As this court stated in the case of Johnston vs. Otta, 340 Ill. App. 270, 275 (2d Dist.1950) in quoting from 9 C.J. 535: "A broker is bound to exercise reasonable skill and diligence in the transaction of the business intrusted to him and he will be responsible to his principal for any loss resulting from his failure to do so: beyond this he is not bound. If he exercises the same degree of care and diligence that a prudent man would exercise in a like business he is entitled to compensation and is not liable for losses resulting to the principal." See 22 I.L.P. Insurance Sec. 77, pg. 123.

The defendant further suggests that the Retrospective Premium Plan D. which, as it turned out, resulted in additional premiums being imposed, should not be applied to the garage liability policy. It bases this argument on

the contention that the Retrospective Plan Endorsement was not physically attached to this policy. This argument totally ignores the fact that Bachrodt was advised in his conversation with Mosser prior to the issuance of the policies that the Retrospective Premium Plan applied to both policies. It further ignores the fact that Mosser again mentioned this in his conversation with Bachrodt in May of 1960, at which time Bachrodt was questioning the premium rates being charged defendant. In his letter to Bachrodt of May 16,1960, wherein Mosser confirms their conversation of that day, he states, "The Retrospective Plan includes both the Workmen's Compensation and Garage Liability, and this is the only basis that they would accept the risk."

More importantly, this argument ignores the fact that the first page of the Liability Policy (No. CL 848938) lists as being a part of that policy, ten attached endorsements. The tenth endorsement listed as being a part of the policy is entitled, "GU-7605a Retrospective Premium Endorsement - Plan D". This endorsement, attached to the policy and entitled, "Retrospective Premium Endorsement - Plan (D) (Short Form)" states that it is a part of the above policy and provides, "It is agreed that the premium for the policy shall be computed in accordance with the provisions of the Retrospective Premium Endorsement - Plan (D) forming a part of Policy WC-330715." The latter is the Workmen's Compensation Policy furnished defendant. The Retrospective Premium Endorsement Plan (D) attached to the latter policy is the long form spelled out in detail. This endorsement further states, on its face, that it applies to both the Garage Liability and Wormen's Compensation Policies, designating them by policy numbers.

Unless he is mislead by the insurer, a person who accepts and retains an insurance policy is bound to know its contents. Pollock vs. Connecticut Fire Insurance Policy of Hartford, 362 Ill. 313, 320 (1935). It cannot be said that Bachrodt was mislead. To the contrary, he was informed on all occasions that the Retrospective Premium Endorsement Plan (D) applied to both the Workmen's Compensation and Garage Liability Policies.

The only defense asserted by the defendant to the complaint, and the sole basis of its counterclaim against the plaintiff, was that plaintiff committed wrongful acts and omissions through Camlin, while the latter was acting as its agent. Having found that Camlin committed no wrongful act or omission in the things complained of, said defense is not available to defendant.

We find no error in the judgment of the trial court, and the judgment is accordingly affirmed.

Judgment affirmed.

ABRAHAMSON, P.J. and MORAN, J. Concur

49456

55 I.A.2387

A

CATHERINE JEFFERY,
Plaintiff-Appellant,
v.
ANTHONY JEFFERY,
Defendant-Appellee.

APPEAL FROM THE
SUPERIOR COURT OF
COOK COUNTY

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal from an order for summary judgment in favor of plaintiff-appellee. [1]

The parties were married on December 12, 1948 at Castelvetrano, Italy, and later migrated to the City of Chicago. They were maternal first cousins and were married with the consent of the Roman Catholic Church and the Italian Civil Authorities. They were divorced on March 21, 1962 in Cook County on the complaint of Catherine Jeffery. There were four children born of the marriage, ranging in age from twelve years to two years, at the time of the divorce. After the divorce, litigation continued as to the custody and support of the minor children, and during these proceedings, the parties agreed to remarry. The same judge who heard these proceedings, remarried the couple, on May 9, 1963. The wife, Catherine Jeffery, subsequently filed suit for separate maintenance, and the husband, Anthony Jeffery, countered with a suit for annulment on July 29, 1963. The cases were consolidated and a motion for summary judgment was filed by Anthony Jeffery based on the ground that the parties were remarried in Illinois contrary to the laws of consanguinity, which prohibited marriages between first cousins. The court granted summary judgment, from which Catherine Jeffery appeals.

Appellant's appeal rests on two theories. Her first theory is that the prohibition in the Marriage Act, which voids marriages between cousins of the first degree, applies only to original marriages and not to those situations in which a prior valid marriage has existed

1. Appellant filed this appeal as a plaintiff-appellant, when in fact she was the defendant in a consolidated lower court proceeding.

between the same parties. The second theory is that the legislature in revising the Criminal Code so as to exclude the imposition of a criminal sanction on cousins of the first degree who marry, impliedly repealed the aforesaid prohibition found in the Marriage Act. Paragraph 1 of Chap. 89 of the Ill. Rev. Stat. (1963) provides as follows:

> "Hereafter marriages between parents and children including grandparents and grandchildren of every degree, between brothers and sisters of the half, as well as of the whole blood, between uncles and nieces, aunts and nephews, and between cousins of the first degree are declared to be incestuous and void. This section shall extend to illegitimate, as well as legitimate children and relations."

Appellant, in support of her first theory, contends that the courts as parents patrie of all children within their jurisdiction must protect the interest of children and thus a remarriage between two parties who were previously validly married should be upheld to protect the rights of the children who are innocent third parties. This contentio is invalid, as the children involved in the instant situation occupy the same position as do children whose parents obtain a divorce and do not remarry. These children are not bastardized and are not deprived of custody and support.

Appellant further contends that in the eyes of the Roman Catholic Church, the parties were and still are validly married, by virtue of the consent given by church authorities in Italy and their civil remarriage should not disturb this view. This contention is also without merit. With this in mind we must examine the second theory on which appellant rests her case.

Paragraph 375 of Chap. 38 of the Ill. Rev. Stat., which was in effect prior to January 1, 1962, stated as follows:

> "Persons within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who shall intermarry with each other, or who shall commit adultery or fornication with each other, or who shall lewdly and lasciviously cohabit with each other, shall be imprisoned in the penitentiary for a term of not less than one year and not exceeding ten years."

Under the new Criminal Code which took effect on January 1, 1962, the provisions of Section 375 were revised and became Section 11-11, and now reads as follows:

> "(a) Any person who has sexual intercourse or performs an act of deviate sexual conduct with another to whom he knows he is related as follows commits incest:
>
> (1) Mother or son; or
>
> (2) Brother or sister, either of the whole blood or the half blood.
>
> (b) Penalty
>
> A person convicted of incest shall be imprisoned in the penitentiary from one to ten years.

In support of her second theory, appellant points out that Section 11-11 of the new Criminal Code, revised Section 375 of the old Criminal Code, by not penalizing sexual intercourse between cousins of the first degree. Appellant further alleges that the legislative history of Section 375 and Section 1 of the Marriage Act reveals that the two provisions are in pari materia and have to be construed together. The appellant after reviewing the legislative history of these provisions as set out in Arado v. Arado, 281 Ill.123 (1917), then contends that repeal of Section 375 of the Criminal Code and adoption of Section 11-11 impliedly repealed Section 1 of the Marriage Act. Appellant concludes that because of his contention of the implied repeal, there is no law in Illinois prohibiting marriage between first cousins, and thus the remarriage here is valid. After an examination of the legislative history of these provisions, we agree with appellant that they are in pari materia and that one statute cannot be construed without reference to the other. Southmoor Bank and Trust Company v. Willis, 15 Ill.2d 388 (1958). We disagree, however, that the adoption of one section repealed the other. Repeals by implication are not favored. Caruthers v. Fisk University, 394 Ill. 151 (1946). Fields v.

Lueders, 274 Ill. 562 (1916). Wilhelm v. The Ind. Comm., 399 Ill. 80 (1948).

In the Tentative Final Draft of the Proposed Illinois Revised Criminal Code of 1961, (1960, Burdette Smith Company, Chicago) at page 258, the committee comments state:

> "...The section represents a change in point of view from the existing section. It abandons the idea that criminal incest provisions must be identical in scope to similar marriage prohibitions. Denying the right to marry may justly be responsive to influences which are not so compelling when the scope of criminal laws are seriously reviewed. (See Model Penal Code, Tent. draft No. 4, comments, at pp. 261-63)...since an overhaul of marital restrictions based on incest is clearly beyond the scope of this Code, the problem of incest restrictions was considered only within the confines of the criminal law...."

We conclude that we should not imply a repeal. A criminal sanction may be repealed without disturbing a similar civil prohibition.

Appellant relies on People v. Centaur Motor Co., 192 Ill. App. 409 (1915), which stated at page 413:

> "When there are two statutes imposing a penalty and the penalty imposed by one is not the same as that imposed by the other, the later statute repeals the earlier."

That case is not in point with the instant situation, as here we are concerned with the effect of a revised penal provision on a civil provision. We conclude that Section 1 of the Marriage Act voiding the marriage or remarriage of first cousins, residents of this State, expresses the public policy of Illinois. The judgment is affirmed.

JUDGMENT AFFIRMED.

Burke, P.J., and Bryant, J., concur.

Gen. No. 64-79

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

GERALD TOMAMICHEL,	:	
Plaintiff-Appellant,	:	APPEAL FROM THE
-vs-	:	CIRCUIT COURT OF
OSCAR EDDINGTON,	:	MONTGOMERY COUNTY
Defendant-Appellee.	:	

EBERSPACHER, P. J. This is a suit for accounting filed by a layman pro se without assistance of counsel. Plaintiff alleges that defendant disposed of two items of agricultural equipment, which were owned by plaintiff and that he had never authorized any sale thereof. Plaintiff asks that defendant be required to account and that judgment be rendered against defendant for the sum of Twelve Hundred Dollars and costs. Defendant answered that this equipment was mortgaged to the Illini Production Credit Association, that its agent caused this farm equipment, described in plaintiff's complaint, to be brought to a farm sale being held by defendant. That the equipment was sold and the proceeds were paid to Illini Production Credit Association. Defendant also alleges that allegations of the complaint were

made without reasonable cause, were not made in good faith, and asked that the suit be dismissed and reasonable attorney fees be taxed in accordance with Section 41 of the Illinois Civil Practice Act. Plaintiff filed a verified general denial to the Answer. The case was heard without a jury, and at the close of plaintiff's case, on motion of defendant, the suit was dismissed at the cost of plaintiff and upon proof of customary and reasonable fees, an attorney fee of $250.00 was awarded to defendant. It is from this judgment that plaintiff-appellant appeals.

The evidence shows that plaintiff owned various pieces of agricultural equipment in 1960. That on September 3, 1960, he borrowed moneyfrom the Illini Production Credit Association and gave a chattel mortgage on the equipment to secure the loan. In 1961, the lender requested additional security and the defendant and his wife added their signatures. When the mortgage indebtedness was about to mature, the lender requested that it be "liquidated". Plaintiff voluntarily agreed to a sale at the office of the Credit Association on March 20, 1962 in the presence of defendant and his wife, with no reservations, and on April 16, 1962, a sale was held at which plaintiff was present, and at which the mortgaged property, except the disc and land leveler and a truck were sold. Plaintiff's witness, the agent of the Credit Association, testified that the disc and leveler could not be located at the time of that sale, and that on the date of that sale plaintiff suggested the two items should not be sold.

After April 16, 1962, the lender took possession of the disc and land leveler and stored them at the farm residence of a Donald King. There is some evidence in the record before us that plaintiff was declared incompetent on May 16, 1962 and that the order later was vacated. Plaintiff was offered the opportunity to introduce court records on this point, but he declined to do so. Thereafter, Donald King, at the request of the lender, dragged these items to the defendant's farm and they were sold at public sale on May 26, 1962. A George Fravala bought the leveler for $530.00 and defendant bought the disc for $160.00. The checks in payment of these items were made payable to Illini Production Credit Association and were applied towards plaintiff's indebtedness. The defendant, as co-signer on the note, gave the lender his personal check in the amount of $497.84 in payment of the balance due on the note owed by plaintiff, and thereafter lender released the chattel mortgage. An agent of the Illini Production Credit Association, called as plaintiff's witness, testified that these items in question were sold under the authority of his organization. Plaintiff, in his testimony, admitted that he had agreed to sale of the mortgaged property to liquidate the loan on March 20, 1962.

It appears that the plaintiff was aware that the proceeds from the sale of the disc and leveler had been applied towards his indebtedness, and the note paid in full. Plaintiff offered no evidence that the disc and leveler were sold for less than

their fair value nor did he ever so allege. There is no allegation or proof that defendant misappropriated any of the funds received. A "trust de son Tort" was not created and the defendant was not liable under any theory as a trustee.

We now come to the question of the awarding of the judgment for $250.00 attorney fees to the defendant under Section 41 of the Civil Practice Act. In Ready v. Ready 33 Ill. App. 2d 145, the court held that the statute was in derogation of the common law, but was at the same time a remedial statute. The court further said "Section 41 is an attempt of the legislature to penalize the litigant who pleads frivolous or false matters or brings a suit without any basis in law and thereby puts the burden upon his opponent to expend money for an attorney to make a defense against an untenable suit. The failure of the courts to apply the sanction provided in this section of the Civil Practice Act has been frequently criticized by writers in the various law reviews". In Adam v. Slifer 342 Ill. App. 415, it was held that in proceedings for assessment of costs under a statute subjecting a party making untrue allegations and denials in bad faith to reasonable expenses incurred by the other party as a result thereof, the party sought to be charged should be afforded ample opportunity for cross-examination and to present evidence in rebuttal.

The trial judge here made his determination, the evidence supported his finding, reasonable attorney fees were proven by

defendant, and plaintiff had ample opportunity for cross-examination and to present rebuttal evidence.

The judgment of the Circuit Court of Montgomery County is affirmed. Not to be published in full.

Concur /s/ George J. Moran

Concur /s/ Joseph H. Goldenhersh

NO. 64-72

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

LEONARD HOLT, Plaintiff and Counter Defendant-Appellee, vs. SHELBY MATHES, d/b/a SHELBY'S SERVICE STATION, Defendant and Counter Plaintiff-Appellant.	Appeal from the Circuit Court, Magistrate Division, Twentieth Judicial Circuit, to the Appellate Court of Illinois, Fifth District. Honorable John Little Magistrate Presiding

GOLDENHERSH, J.

This is an appeal taken under the provisions of Rule 36-1, of the Supreme Court Rules. The case was tried before a magistrate, without a jury.

Defendant operates a service station and garage in East St. Louis. On several occasions between November of 1962, and August of 1963, defendant made repairs to plaintiff's 1956 Oldsmobile. From August, 1963, until October 15, 1963, plaintiff had difficulty with the car because of fluid leaking from the transmission. On or about October 15, 1963, plaintiff returned the car to defendant's

shop for repairs. He told defendant he was in no hurry for the repairs to be completed. He testified that he again saw defendant in the early part of November, that the repairs had not been made, that at that time he told defendant that he had recently had the radiator repaired and to be sure to check the antifreeze in the radiator and put in such antifreeze as might be necessary. Defendant's garage had no facilities for inside storage of automobiles and at all times plaintiff's car was on the lot adjacent to the garage building. In the early part of December, plaintiff returned to defendant's garage, told defendant he was going to need the car, saw that the car was standing in the same place where he had last seen it, that he raised the hood and saw ice on the tie rods, that he then asked defendant if he had put antifreeze in the car and was told by the defendant that he had not done so, that he had put antifreeze in all the cars on the lot but by the time he got to plaintiff's car, it was frozen. Defendant told plaintiff he would check the car and call him, and when he called two or three days later, he told plaintiff the block was broken.

Defendant testified that the automobile was brought to his shop, that plaintiff mentioned antifreeze for the first time after defendant had taken the transmission from the car and placed it inside the repair shop, that

there had been freezing weather two or three times prior to their conversation and the block was already frozen. The magistrate found the issues for plaintiff and entered judgment in plaintiff's favor for $125.00 and costs of suit.

Defendant contends that plaintiff has failed to prove that the damage was caused by defendant's negligence and that plaintiff was guilty of contributory negligence and thus is not entitled to recover.

The delivery of the car to defendant for repair created a bailment for hire. Wiegert vs. Davis Cleaning & Dyeing Co. 254 Ill. App. 63. Plaintiff made out a prima facie case of negligence when he proved the delivery of the car to defendant with its block unbroken and its subsequent damage while in defendant's possession. Priester vs. Judkins, 7 Ill. App. 2nd 414. The prima facie case of defendant's negligence having been made, it was defendant's burden to overcome the presumption of negligence by offering proof that he was not negligent. Brown vs. Welborn 338 Ill. App. 507. The trial court's judgment was, of necessity, based upon findings that plaintiff had proved his case as alleged in the complaint. The trial court saw and heard the witnesses and its findings should not be disturbed unless this court can say they are clearly against the manifest

weight of the evidence. Brown vs. Welborn (supra).

The maximum figure stated by any witness purporting to testify regarding the cost of repairing the vehicle was $70.00. It is therefore ordered that the amount of the judgment be reduced and a remittitur is ordered in the amount of $55.00.

Judgment affirmed upon remittitur in the amount of $55.00.

Concur Edward C. Eberspacher

Concur George J. Moran

Publish Abstract Only.

No. 64-10

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

SHIRLEY GULDAN,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Appeal from the
	)	Circuit Court of
HOWARD KIRST,	)	Lake County.
	)	
Defendant-Appellant.	)	

ABRAHAMSON, P. J.

This cause arose from an action for personal injuries as a result of a rear end collision between two automobiles, one driven by Shirley Guldan, the plaintiff, and the other by Howard Kirst, the defendant. The accident occurred December 9, 1961, on Deerfield Road near Briargate Road in Deerfield. The jury returned a verdict in the sum of $20,000 for personal injuries for aggravation of a pre-existing back injury. On this appeal the defendant contends that the Court was in error in not granting a motion for a directed verdict, or in the alternative, a new trial because of the prejudicial remarks and arguments of plaintiff's counsel.

No. 64-10

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FILED

MAR 2 1965

EDWARD K. KELLETT
Clerk, Appellate Court, Second District

SHARLEY QUIGLEY,	)
	)
Plaintiff-Appellee,	)
	)
v.	) Appeal from the
	) Circuit Court of
EDWARD KLAUT,	) Lake County.
	)
Defendant-Appellant	)

ABRAHAMSON, P. J.

This cause arose from an action for personal injuries as a result of a rear end collision between two automobiles, one driven by Shirley Quigley, the plaintiff, and the other by Edward Klaut, the defendant. The accident occurred December 4, 1961, on Deerfield Road near Highgate Road in Deerfield. The jury returned a verdict in the sum of $20,000 for personal injuries for aggravation of a pre-existing back injury. On this appeal the defendant contends that the Court was in error in not granting a motion for a directed verdict, or in the alternative, a new trial because of the prejudicial remarks and arguments of plaintiff's counsel.

The evidence disclosed that the plaintiff had been traveling on Deerfield Road for approximately 10 blocks and was aware of the traffic behind her. It was snowing at the time and the streets were slippery from an accumulation of snow. The defendant had been following for several blocks, maintaining an interval of 3 to 4 car lengths, traveling at an estimated speed of 15 miles per hour. The parties saw a cream colored vehicle preceding the plaintiff about 3 car lengths ahead. This car was making a slow, right hand turn without any signal. The defendant contended the lead car appeared to be fishtailing and that it made an abrupt turn. Upon observing the car ahead, the plaintiff removed her foot from the accelerator and her car began to slide to the right and she turned her steering wheel in that direction. The defendant began pumping his brakes upon noticing plaintiff's vehicle swerving, but he did not slide or skid. The plaintiff's vehicle was damaged in the center of the rear and the defendant's in the front end.

The negligence charge by the plaintiff in substance is as follows:

1) Following too closely,
2) Driving at a speed greater than was reasonable and proper, and
3) Faulty brakes.

It is the defendant's position that there was no evidence to support any of the allegations of negligence, claiming that all of the evidence on the issues, other than the

The evidence disclosed that the plaintiff had been traveling on Deerfield Road for approximately 10 blocks and was aware of the traffic behind her. It was snowing at the time and the streets were slippery from an accumulation of snow. The defendant had been following for several blocks, maintaining an interval of 3 to 4 car lengths, traveling at an estimated speed of 15 miles per hour. The parties saw a green colored Honda precede the plaintiff about 3 car lengths ahead. This car was making a slow, right hand turn without any signal. The defendant contended the lead car appeared to be flashing and that it made an abrupt turn. Upon observing the car ahead, the plaintiff removed her foot from the accelerator and her car began to slide to the right and she turned her steering wheel in that direction. The defendant began pumping his brakes upon noticing plaintiff's vehicle swerving, but he did not slide or skid. The plaintiff's vehicle was damaged in the center of the rear and the defendant's in the front end.

The negligence charge by the plaintiff in substance is as follows:

1) Following too closely,
2) Driving at a speed greater than was reasonable and proper, and
3) Faulty brakes.

It is the defendant's position that there was no evidence to support any of the allegations of negligence, claiming that all of the evidence on the issues, other than the

defendant's own testimony, was circumstantial and that allowable inferences from circumstantial evidence do not support the verdict herein. Coffin v. Chicago City Ry. Co., 251 Ill. App. 169, 174, 175, 176 (1st District 1929) and Kelly v. Fox, 318 Ill. App. 481, 48 N. E. 2d 592, 594 (1st District 1943). The defendant argues that an inference of negligence cannot be taken purely from circumstantial evidence of a rear end collision, particularly where the plaintiff's vehicle was moving when struck.

It has been held, however, that given this circumstance there may be room for no other inference than that the defendant was driving too fast or following too closely and, therefore, is guilty as a matter of law. In Ceeder v. Kowach, 17 Ill. App. 2d 202, 149 N. E. 2d 766, 767, it was held:

> We think defendant was guilty of negligence as a matter of law since it is our opinion that he should have foreseen that plaintiff would probably have to stop for a red light; that traffic on adjoining lanes would prevent turning out of the way of plaintiff's car; that he would have to apply his brakes; that his car would probably skid on the wet pavement if the brakes were applied too suddenly; and that if he were going too fast or was not far enough behind he would collide with plaintiff's car. The fact that his car skidded into plaintiff's car, even though the pavement was wet, leaves room for no other inference, we think, except that under the circumstances defendant was driving too fast or following... too closely. Kronenberger v. Coca Cola Bottling Co., 324 Ill. App. 519. What other drivers at the time and place were doing is of no consequence. They mayhave been negligent also (Kronenberger v. Coca Cola

> Bottling Co., 324 Ill. App. 519) but more fortunate in avoiding consequences."

We are of the opinion that the facts in this case fall within the principles quoted in the Ceeder case.

It cannot be said of the facts established in this case that the jury erred in concluding that the defendant was negligent in the operation of his automobile. Nor was their conclusion conjectural, for no other is fairly inferable from a rear-end collision such as this. The cases cited by the defendant are not factually or circumstantially similar to the case at bar.

The second error alleged concerns remarks made by the plaintiff's counsel during the cross examination of the plaintiff's doctor and in closing arguments. It is contended that the plaintiff had no authority to place before the jury the fact that the defendant had not obtained a physical examination nor was there any medical testimony available contrary to the medical testimony of the plaintiff. On both of these occasions objections were promptly sustained by the court. We are of the opinion that the remarks were not prejudicial nor did they prevent the defendant from obtaining a fair and impartial trial. We do note, however, that in a First District case, Bulleir v. Chicago Transit Authority, 41 Ill. App. 2d 95, 190 N. E. 2d 476, 480, the court commented:

> We believe that it would have been proper for counsel to point out the absence of defense medical testimony...

For the reasons above indicated the judgment of the Circuit Court of Lake County is affirmed.

JUDGMENT AFFIRMED.

CARROLL, J. and MORAN, J. concur.

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STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 10597 Agenda No. 8

People of the State of Illinois,

Plaintiff-Defendant in Error

vs.

Herbert Miller, also known as Herbert Miller, Jr.,

Defendant-Plaintiff in Error

Error to the Circuit Court of Champaign County

CRAVEN, J.

The Defendant, Herbert Miller, Jr., was convicted by a jury in Champaign County of Count I of a four-count indictment charging attempted murder. The Defendant was sentenced to the penitentiary for a term of not less than five years nor more than 10 years, and from this judgment the Defendant petitioned the Supreme Court for

a writ of error. The Supreme Court transferred this case to this Court September 18, 1964.

Most of the basic facts are not in dispute. The Defendant, Miller, was using a loaded revolver to threaten Mrs. Bellar Reynolds in her home in Champaign, Illinois, in the early afternoon of March 26, 1962. The evidence showed that Mrs. Reynolds and the Defendant were cohabiting in this residence. Mrs. Reynolds' daughter, Christine, was present in her mother's home at this time and ran next door to her own home to summon her husband, Floyd Brown. Brown went next door to assist his mother-in-law and the Defendant shot him in the wrist.

Brown then returned home and phoned the police. Officer Eldridge L. Decker, dressed in plain clothes, and three uniformed policemen arrived on the scene shortly thereafter. Officer Decker went to the back door with one of the uniformed officers and identified himself by shouting through the closed door. Officer Decker and Mrs. Reynolds testified Miller then threatened to kill the police. The police officers kicked in the back door and Officer Decker entered with gun in hand.

After Officer Decker's entry the accounts vary. Officer Decker and Mrs. Reynolds claim Miller raised the gun, pointed it at Decker and attempted to fire it. Both testified the gun failed to fire but stated there was an audible clicking noise. The Defendant's version was that he reached out to hand the police officer the gun and was told to throw it on the floor. He testified all of this occurred after Mrs. Reynolds left the room. He stated positively he did not pull the trigger on the gun and did not intend to shoot any of the police officers.

The Defendant contends that evidence of the shooting of Floyd Brown is inadmissible to prove the offense charged and that its admission into evidence is prejudicial and reversible error. We are cited many cases beginning with Farris v. People, 129 Ill. 521, holding that evidence of separate criminal offenses is not admissible to prove the offense charged. The holding in the Farris decision was that evidence of the rape of the wife of a murder victim subsequent to the murder in no way tends to prove the crime of murder. The test, which has been repeated time and again, is whether evidence

of another crime fairly tends to prove the crime charged. People v. Ciucci, 8 Ill. 2d 619; People v. Fricker, 320 Ill. 495; People v. Rogers, 413 Ill. 554.

Applying that test, we find that evidence of the prior shooting was admissible for the purpose of proving that the Defendant used the gun as a weapon at the time and place as stated in the indictment. The specific intent to commit murder is the gravamen of the attempt. People v. Woods 24 Ill. 2d 154, 158. The Defendant recognizes this and also alleges that the State failed to prove the specific intent beyond a reasonable doubt. At the same time, the Defendant wishes to exclude evidence of his own conduct and acts at the approximate time, exact place and with the same weapon used to commit the offense charged. Mr. Justice Daily recently stated the law in Illinois with regard to this question in People v. Clark, 9 Ill. 2d 46, 56.

> "Where a specific intent is an essential element of a crime and the prosecution must prove this specific intent in order to secure a legal conviction, evidence of similar acts committed by the accused, happening at or about the same time, is relevant and competent to show such intent." [People v. Popescue, 345 Ill. 142, 177 N.E. 739, 77 A.L.R. 1199; People v. Folignos, 322 Ill. 304, 153 N.E. 373.] "That such

evidence proves or tends to prove an offense other than the one with which the accused is charged is never a valid objection to its admissibility."

Where the crime charged is one requiring proof of specific intent, other related acts are often the only means to establish how and why a person acted in a certain manner. The trial court allowed the admission of the prior shooting of Floyd Brown because the evidence was "...!so closely connected to them, it is part of this transaction, part of the res gestae, part of proving intent!" We concur.

Further, the evidence of the prior shooting, together with evidence of the threats made by the Defendant, his proximity to the police officer when he pointed the gun and pulled the trigger, was sufficient evidence upon which the jury could find the requisite specific intent.

A more serious question arises upon consideration of the instructions. The Defendant presented his defense on one ground--the absence of the requisite specific intent. This is a question of fact to be determined

by the jury in light of all the surrounding circumstances. Since the only controverted factual issue was whether or not the Defendant specifically intended to kill the police officer, the jury must be adequately instructed on this point. People v. Kalpak, 10 Ill. 2d 411. A defendant is entitled to have an instruction which properly presents his theory of the case. People v. Provo, 409 Ill. 63.

The trial court refused to give the Defendant Instructions 6 and 13, which read as follows:

"DEFENDANT'S INSTRUCTION 6.

The Court instructs the jury that if you find that the Defendant did in fact pull the trigger on the gun which he had, however, that he did not intend to kill or murder Eldridge Decker you should find the Defendant not guilty."

"DEFENDANT'S INSTRUCTION 13.

The Court instructs the jury that in order to convict the Defendant of an attempt to commit murder it is necessary for the people to prove beyond a reasonable doubt that the Defendant deliberately formed an intention to murder Eldridge Decker and that having formed such intention he attempted to carry such intention into effect and that he took a substantial step towards the commission of the crime."

These instructions are limited but accurate statements of the law. However, the jury was properly instructed as to intent in People's Instructions 8, 9, 10, 12 and

Defendant's Instructions 7 and 11. Neither the People nor the Defendant are entitled to repetitious instructions which lend undue emphasis to one particular element of the crime. It is sufficient that the jury was adequately instructed as to the applicable law and the Defendant's theory and defense.

The Defendant claims that Count I of the indictment is insufficient, as it fails to allege acts constituting a substantial step toward the commission of the crime of murder. The pertinent language of the indictment reads:

> "...in that he, with intent to commit the offense of murder, attempted to shoot and kill Eldridge L. Decker with a gun..."

The Defendant contends that this is a mere conclusion and does not state facts constituting a substantial step. This contention is without merit. It is inconceivable what further facts could be alleged to show a substantial step toward the commission of murder than to allege an attempt to shoot and kill Eldridge L. Decker with a gun. The Defendant was apprised of the exact date, place and alleged victim, together with the weapon and method by which the substantial step was taken.

The final error assigned is that the trial court unduly limited the cross-examination of Mrs. Bellar Reynolds as to her relationship with the Defendant. Mrs. Reynolds was asked two questions to which objections were sustained:

> "Q. Do you want him to come back home with you?"
>
> - and -
>
> "Q. While you lived together, who paid for the support? Did you get any money from Mr. Miller for supporting the children?"

Both these questions were answered "No" prior to the court's ruling on the objections. These questions were objectionable as irrelevant and also because they did not directly impeach or attempt to show actual bias or prejudice against the Defendant. Even if this ruling could be considered error, since these questions were answered in the presence of the jury, it was harmless where the answer was not stricken. This is especially true in this case where the remainder of the record shows no proof or allegation of the prejudice of Mrs. Reynolds toward the Defendant. The scope of cross-examination has always been within the jurisdiction and discretion of the trial court. People v. Mason, 28 Ill. 2d 396, 403. We find no abuse

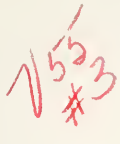
of that discretion here.

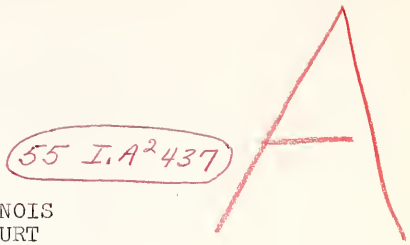
After examining the entire record in light of the errors assigned, we are convinced that the judgment and sentence of the trial court must be affirmed.

AFFIRMED

Smith, P.J., and Trapp, J., concur.

Abstract





55 I.A.2 437

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 10600 Agenda No. 1

The People of the State of Illinois, Plaintiff-Appellee vs. James Clyde Meeks, Defendant-Appellant	Appeal from the Circuit Court of DeWitt County

CRAVEN, J.

This case was improperly filed as an appeal with the Supreme Court. The Supreme Court transferred this case to this court for disposition of the questions herein set forth.

The defendant assigns 14 alleged errors in this record, most of which are repetitive. Essentially, the errors asserted are that the indictment is insufficient, the proof was insufficient, and that the defendant was denied counsel.

The issues of the sufficiency of the indictment and the proof thereunder will be considered together, as both relate to whether the defendant was charged under the proper section of our old Criminal Code.

The material facts necessary to a proper understanding of this question are as follows: The defendant allegedly falsely endorsed the name "Ralph Bailey" to a check made payable to Ralph Bailey. The check was drawn upon a non-existent account of a Stevens Construction Co. with The First National Bank of Springfield, Illinois, and purportedly drawn by a B. G. Stevens on behalf of a Stevens Construction Co. John K. Thurber testified he witnessed the defendant negotiate and cash this check in his tavern on the evening of December 9, 1960. At this time, the defendant allegedly exhibited identification of a Ralph Bailey. William Barrett, witness for the People, and former sheriff of DeWitt County, testified he checked at Springfield and found "there was no such company" as Stevens Construction Co. The indictment contained two counts, the pertinent parts of which are set forth below:

"COUNT ONE

"...'That James Clyde Meeks...did make, forge and counterfeit a certain check'..."

(Terms of instrument set forth)

"COUNT TWO

"...'That James Clyde Meeks...did pass, utter and publish...a certain false, forged and counterfeited bank check'..."

The pertinent parts of the statutes involved are:

> Chap. 38, Sec. 277 of Ill. Rev. Stat. 1959
>
> "Every person who shall falsely make, alter, forge or counterfeit any...check...or shall utter, publish, pass...any (check)..."
>
> Chap. 38, Sec. 279 of Ill. Rev. Stat. 1959
>
> "Whoever shall make, pass, utter or publish...any fictitious...check ...when in fact there shall be no such bank, corporation, co-partnership or individual in existence..."

The indictment does not allege the existence or nonexistence of the obligor, Stevens Construction Co. However, it did set forth, in both Count One and Count Two, the essential elements of forgery under Sec. 277: A false writing capable of defrauding and an act done with intent to defraud. People v. Katz, 356 Ill. 440, 444. Therefore, this indictment is legally sufficient to charge: A forgery in Count One and a fraudulent passing in Count Two,

which are separate offenses defined in the same statute, Sec. 277, Chap. 38, Ill. Rev. Stat. 1959, Parker v. People, 97 Ill. 32. Both of these counts are insufficient to charge an offense under Sec. 279. People v. Gould, 347 Ill. 298. Since the only evidence on this issue establishes that the obligor, Stevens Construction Co., is nonexistent, this raises the question of material variance and the sufficiency of the proof under the offense charged.

This is not a problem under the present law, as both Sections 277 and 279 are now incorporated into Chap. 38, Sec. 17-3 of the new Criminal Code. (See Committee Comments, Charles H. Bowman, Smith-Hurd Ill. Anno. Stat. Chap. 38, Sec. 17-3) Under the new law, an indictment such as this one would incorporate both a forged and fictitious check. Under the old law, we must consider two separate provisions. We believe that the legislature intended to exclude a fictitious check, as set forth in Sec. 279 from the terms used in Sec. 277. If this were not so, we must ascribe to the legislature the intent to adopt a redundant and meaningless section which contains the same elements to prove the same offense.

A federal statute, U. S. Code, Title 18, Sec. 2314, is analogous to our present Chap. 38, Sec. 17-3. It makes it a federal offense to transport interstate "any falsely made, forged, altered, or counterfeited securities." There is no separate statute prohibiting the interstate transportation of "fictitious securities," as in our old Criminal Code. However, in construing the meaning of the several terms used, the federal courts have reached the conclusion that "forgery" implies the existence of a real obligor, although a "false making" does not. In distinguishing the several terms used, the United States Court of Appeals for the Fifth Circuit stated as follows:

> "Manifestly, the words 'altering' and 'counterfeiting' could refer only to a crime based upon a preexisting genuine instrument. Forgery, however, does not necessarily carry such presumption but indicates that there is a genuine or real obligor in existence whose obligation has been simulated. To 'falsely make' is a crime not of changing or forming an instrument to resemble an existing genuine instrument or to represent that it is the act of a genuine and existing obligor, but rather to make an instrument which has no original as such and no genuine maker whose work is copied, although in form it may resemble a type of recognized security."

Pines v. United States, 123 Fed. 2d 825, 828. Also see Faibisy v. United States, 221 Fed. 2d 584. If there were

no Sec. 279, it might be contended that the terms of Sec. 277 were as comprehensive as the federal statute and our present Sec. 17-3. However, since we are considering two separate sections, we construe them to define two separate offenses.

The record is barren as to proof of the existence or nonexistence of B. G. Stevens or Ralph Bailey. However, neither B. G. Stevens nor Ralph Bailey is the obligor on the instrument. B. G. Stevens signed as agent on behalf of the obligor, Stevens Construction Co., and Ralph Bailey was the payee. It is incumbent upon the People to prove, not the defendant to disprove, the essential elements of the offense charged. Here the People proved this instrument fictitious in origin and have not alleged or offered proof as to the existence or nonexistence of the other parties on the instrument. It is not apparent from this record whether B. G. Stevens and Ralph Bailey are actual persons or simply names.

Reading the two statutes, we find that the facts of this case were within the express terms of Sec. 279, and thus excluded from offenses chargeable under Sec. 277. Only one case has considered both these statutes as related

to a single act. In that case our Supreme Court reasoned:

> "Plaintiffs in error are not charged in the indictment with the forging of the handwriting of another person. The indictment charges them with making, passing and uttering a fictitious note purporting to be the note of M. D. Tomlinson, there being then in existence no such individual as M. D. Tomlinson. The word 'person,' as used in section 105, means a human being. (Webster's Unabridged Dict.) Section 107 expressly applies to cases where the name of a fictitious person is signed to the note. Section 105 does not apply to cases where the name of a fictitious person is signed to the note, therefore the indictment charged no crime under section 105."

People v. Gould, 347 Ill. 298, 303.

Contrary to the People's contention, there is no question of waiver here. The material and fatal variance from the allegations in the indictment makes the proof insufficient to support the charges as set forth in both Count One and Count Two. This error was preserved in the defendant's motion for directed verdict and post trial

motion directed at the insufficiency of the evidence to support the offenses charged.

For the reasons stated, the judgment is reversed.

REVERSED

Smith, P.J., and Trapp, J., concur.

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55 I.A.2 479

IRVING H. PHILLIPS,

Plaintiff-Appellant,

v.

IRVING GETZ and NORTHWEST TOWING, INC., a corporation,

Defendants-Appellees.

Appeal from the Municipal Court of Chicago, First Municipal District of the Circuit Court of Cook County, Illinois.

MR. PRESIDING JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

The plaintiff, Irving H. Phillips, appeals from an order of the Municipal Court of Chicago vacating a default judgment against the defendant, Northwest Towing, Inc.

The plaintiff brought an action against Irving Getz and Northwest Towing as codefendants. His complaint alleged that on April 27, 1963, he parked his car on an empty lot owned by Getz and that when he returned he found it gone. He notified the police who told him that they would issue a stolen car report and advised him to get in touch with the owner of the lot to ascertain if the automobile had been towed away. He phoned Getz who assured him that he knew nothing of the incident. Several days later the plaintiff learned that the automobile had been towed away on Getz's orders by Northwest Towing and that it was in the latter's garage. He went there, paid towing and storage charges and retrieved his automobile.

The plaintiff further alleged that Getz and Northwest were under a legal duty to notify him of the whereabouts of the automobile, and he claimed damages for the towing and storage charges, for damage allegedly done to the car while in Northwest's possession and for his own out-of-pocket

expenses during the five days he was without the use of his car. Summons issued against both parties and Getz appeared pro se, but Northwest Towing did not appear. On July 22, 1963, an order was entered finding the company in default for failure to appear and on October 29th a default judgment of $350.00 was entered against it. In December, 1963, garnishment was instituted against its bank account.

In January, 1964, Northwest Towing filed an appearance and moved to vacate the default judgment. Its president, in his accompanying affidavit, stated that he had received the summons and immediately forwarded it to the company's attorney with instructions to appear and defend the action. He said that the next information received by the company was a notice from the bank that its account was being garnisheed. In its motion the company denied any obligation to inform the owner of the automobile, its defense was that it had been engaged by Getz and had followed his instructions to remove the automobile from his property. The court entered an order vacating the default judgment and assigned a new trial date.

The parties have raised and argued several points in their respective briefs but have overlooked entirely this court's lack of jurisdiction to hear this appeal. Although neither of the parties raised the question of jurisdiction, it is our duty to do so sua sponte when we find jurisdiction wanting. McKee v. Standard Cartage Co., 34 Ill. App. 2d 151, 180 N.E.2d 739; Reynolds v. Wangelin, 314 Ill. App. 12, 40

N.E.2d 900. The Civil Practice Act limits the right of review to appeals from final judgments, orders and decrees. Ill. Rev. Stat., 1963, chap. 110, sec. 77. The order in question is one vacating a default judgment and resetting the case for hearing. This court has repeatedly held such an order is interlocutory and, therefore, neither final nor appealable. Dross v. Farrell-Birmingham Co., Inc., 51 Ill. App. 2d 192, 200 N.E.2d 912; Chamness v. Minton, 39 Ill. App. 2d 325, 188 N.E.2d 873.

Even if the order were final, we would be forced to dismiss the appeal for another reason. This action was against two defendants, and while the order and subsequent proceedings above described have taken place as to Northwest Towing there has been no disposition of the action against Getz. When an action involves multiple parties or multiple claims for relief, an order affecting one or more but less than all of the parties or claims may be appealed only upon an express finding by the trial court that there is no just reason for delaying the appeal. Ill. Rev. Stat., 1963, chap. 110, sec. 50(2); Weidler v. Westinghouse, 37 Ill. App. 2d 95, 185 N.E.2d 100. No such finding was made by the trial court.

For the above reasons the appeal is dismissed.

Appeal dismissed.

Sullivan and Schwartz, JJ., concur.

Abstract only.